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IN THE

Supreme Court of the United States

No. 83, October Term, 1946.

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA COAL COMPANY and ERIE RAILROAD COMPANY,

Appellants,

—*vs.*—

WILLIAM SCHEELE, Recorder of the Township of SADDLE RIVER, and the TOWNSHIP OF SADDLE RIVER, a municipal corporation of the State of New Jersey,

Appellees.

JAMES THOMPSON,

Appellant,

—*vs.*—

WILLIAM SCHEELE, Recorder of the Township of SADDLE RIVER, and the TOWNSHIP OF SADDLE RIVER, a municipal corporation of the State of New Jersey,

Appellees.

APPELLEES' BRIEF

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS.

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APPELLEES' BRIEF

(1) Opinions Delivered in the Courts Below.

The opinions delivered in the Courts below are officially reported as follows:

New Jersey Supreme Court, *Independent Warehouses, Inc. et als. v. Scheele, et al.*, and *James Thompson v. same defendants*, 132 N. J. L. 390; New Jersey Court of Errors and Appeals, *Independent Warehouses, Inc., et als. v. Scheele et al.*, and *James Thompson v. same defendants-appellants*, 134 N. J. L. 133.

(2) Grounds of Jurisdiction.

The appellants claim that the judgment of the Court of Errors and Appeals of New Jersey in this matter (R. 265) is violative of the commerce clause of the United States Constitution and deprives them of due process and the equal protection of the laws.

(3) Statement of the Case.

Appellants' statement of the case is confusing and inaccurate due to their omission of certain of the material facts.

The appellants herein, Independent Warehouses, Inc. and James Thompson were convicted before the Recorder of the Township of Saddle River and fined $200.00 each (R. 6-9) on a complaint which charged the corporation with having conducted or carried on a business of the storage of personal property in a warehouse engaged in storing goods for hire without having obtained a license so to do for the place and premises in which said business was conducted in violation of Section 1 of an ordinance of the Township of Saddle River (R. 9). The complaint against the individual James Thompson charged him with having worked in, occupied, or utilized said place or premises. (R. 14).

Writs of certiorari were allowed by the Supreme Court of New Jersey for the review of the judgments of the Recorder's Court (R. 1). In that court the appellants assigned as reasons for the reversal of the judgments of conviction that the license fee imposed was unreasonable and that the ordinance placed an illegal burden upon interstate commerce (R. 15).

The Supreme Court of New Jersey permitted the Erie Railroad Co. and the Pennsylvania Coal Co. to intervene in the matter on the ground that the writ might affect their interests adversely (R. 20).

The state Supreme Court ordered the convictions reversed holding that the ordinance was unreasonable and that the goods stored in the warehouse were the subject of interstate commerce (R. 253-257).

On appeal to the Court of Errors and Appeals of New Jersey, which is the court of last resort in that state, the judgment of the New Jersey Supreme Court was reversed and the judgments of conviction affirmed (R. 275), that court holding that the license fee was not unreasonable and that there was a cessation of interstate commerce when the goods were placed in storage at the storage yard in question (R. 265-274).

It is not denied that Independent Warehouses, Inc. was operating the business of the storage of personal property in a warehouse for hire within the Township of Saddle River without a license so to do or that Thompson was employed by Independent Warehouses, Inc. (R. 7, 12, 14, 134, 151). The controversy between the parties is over the right of the municipality to impose, for the purpose of revenue, a license fee on the storage yards in question. In 1921, in *Pennsylvania Coal Co. v. Saddle River*, 96 N. J. L. 40, an attack was made on the taxation of the goods in storage at this yard on various grounds, including interstate commerce, and the New Jersey Supreme Court held that the coal in this yard was subject to taxation under the State Tax Act. Taxes were paid on the coal up to and including the year 1939 (R. 188). As to the 1940 tax assessment on the coal, in *Pattison & Bowns v. Saddle River Township*, 129 N. J. L. 135; 130 N. J. L. 177, it was held that coal stored in fenced in piles or in an otherwise open tract of land equipped to handle the same was within the purview of Section 54:4-3.20 of the Revised Statutes of New Jersey which exempted from taxation under the New Jersey Tax Act, personal property stored in a warehouse engaged in the business of the storage of personal property for hire.

Under the statutes of New Jersey, revenue for the support of the state, counties and municipalities is raised in several ways, but principally by direct taxation of property under the State Tax Act R. S. 54:4-1 *et seq.* and by the imposition of fees for revenue under various statutes providing for the same. The loss in revenue to the municipality as the result of the exemption from direct taxation afforded Independent Warehouses, Inc. under R. S. 54:4-3.20, amounted to approximately 8% of the total taxes collected by the Township for local, county, and state purposes. In order to make up this loss of revenue, the municipality thereupon, acting under the provision of R. S. 40:52-1 and 40:52-2 adopted an ordinance in the language of the statutes involved, to impose a fee of ¾ of a cent per each square foot of the ground area of the premises in or at which any commercial warehouse business was conducted (Ex. S-1, R. 9). This license fee meant a charge on the volume of business done at the yard in question of from $.0135 per ton (based on the municipality's computation of area (R. 204) and quantities (R. 68)) to $.0225 per ton (based on the appellants' estimate of area (Ex. P-2, R. 18) and capacity (*Independent Warehouses, Inc.* v. *Scheele*, 132 N. J. L. 390, 391; Ex. D-4, R. 250)); compared with taxation under the State Tax, if the appellants' place of business were a private warehouse, of from 29¢ to 58¢ per ton (R. 208).

Independent Warehouses, Inc., is a corporation of New York engaged in the general warehousing business (R. 134). For at least the previous 15 years it had issued warehouse receipts for coal stored at the yard in question (R. 153, 154, 155, 156 and 158). On June 20, 1939, it was given a lease of the yard for $1.00 per year (Ex. P-5, R. 24) and by a simultaneous agreement it agreed to operate the plant (Ex. P-6, R. 28) for a consideration which amounted to approxi-

mately $500.00 a year (R. 137). Operation under Exhibits P-5 and P-6 consisted of putting up a sign and having an auditor every couple of months check the warehouse receipts issued (R. 144, 145). Aside from the fact that the plant then carried the name Independent Warehouses, Inc., there was no other change in the method of operation (R. 154). Pennsylvania Coal Co., a corporation controlled by the Erie Railroad Co. (R. 93) has owned the yard since 1901 (R. 80) and since that time has either operated it itself or through various affiliated corporations (Ex. P-11).

The storage yards in question in this case are located not on Erie, but on the lines of the New York, Susquehanna and Western Railroad (Ex. P-9, R. 43; P-1, R. 18A) and presumably Erie intervenes, not as a common carrier, but rather because of its financial interest in Pennsylvania Coal Co.

Subsequent to the so-called lease to Independent Warehouses, Inc., Pennsylvania Coal Co. entered into an agreement with Erie whereby the Pennsylvania Coal Co. agreed to operate the yard for and on behalf of Erie for the stated purpose "so that shipments of coal may not be diverted to other and competing lines" (Ex. P-4, R. 20, 21). This agreement, however, made no change in the then existing system of operation except that it served as the means, through free storage, of furnishing a rebate out of Erie funds to the purchasers of coal of Pennsylvania Coal Company coal and similar grades. Despite the fact that Pennsylvania Coal Co. has already leased the plant to Independent Warehouses, Inc. for operation by the last mentioned company (Ex. P-5, p. 24), the agreement with Erie provided that Pennsylvania Coal Co. would continue its present operation of the storage yard (Par. 1, Ex. P-4, R. 20, 22). The yard was to be operated as to interstate shipments in accordance with the rules prescribed by the existing Interstate Commerce Commission Tariff and as to intra-state shipments by

the New Jersey Public Utility Tariff (Par. 2, R. 22). These tariffs had existed since 1906 (R. 123, Ex. P-11). An agent was to be maintained at the yard for the issuance of warehouse receipts (Par. 3, R. 22). This agent had been there for that purpose since at least 1929 (R. 153, 154, 157, 158). The remainder of the agreement obligated Erie to pay the cost of the operation of the yard. The rebate made to coal shippers by Erie under this arrangement amounted to $30,735.59 for the year 1943 (Ex. P-10, R. 49). The physical services performed at Coalberg (the name given to Independent Warehouses' Saddle River Township yard) had been substantially the same since 1903 (the decision in *Penna. Coal Co.* v. *Saddle River*, *supra*, dealt with conditions in 1919), the only change being in the company conducting the operations. The coal is shipped to the shipper with its destination "Coalberg" (Ex. P-12, R. 56). At that point the coal leaves the possession and control of the common carrier and is delivered into the custody of the warehouseman. The freight rate from the point of shipment to Coalberg is collected, plus an unloading charge (Ex. P-12) and two years' free storage is granted (Ex. P-12). Upon the orders of the owner of the coal, it may be reshipped by rail, by truck, or other means (Ex. P-12). If reshipped by rail, the freight rate charged is the balance of the through rate from the point of origin to the point of the new destination on reshipment plus the reloading charge (Ex. P-12). Coal taken from storage for local delivery is charged the local freight rate to Rochelle Park, N. J. (Ex. P-12). The yard does some local business (R. 163). The bulk of the business is with the Edgewater N. J. Coal yards (R. 163) with other of the coal being shipped to accounts in New Jersey, Maine, Massachusetts, and Long Island (R. 163).

The coal in storage is owned by the shipper (R. 136). It is kept in storage until it is ordered out by the owner (R. 137). It is deposited by the owners at appellant's yard to await orders from the owners for future delivery, for the purpose of future disposition and sale (R. 166), for the purpose of keeping a stock on hand to supply customers when the mines are closed (R. 96), or to accumulate a supply to meet demands which the mines are not competent to fill at normal rates of production (R. 96).

Reference is made in the opinion of the court below to the period of operation (R. 273), the corporate relationship between the appellants (R. 272) and the quantum of the tax upon the coal (R. 273). It should be pointed out that these findings of fact on the part of the court below were based in part on admissions of appellants contained in their own exhibits or pleadings but which were omitted by them as unnecessary in the printing of the record of this case (R. 289). Appellants have made no point as to the facts in the present case but for the purpose of clarity and a full understanding of the opinion below in this regard, the material allegations supporting these references are set up from the omitted exhibits as follows:

Exhibit P-11—Record below pages 71 and 72.

"Dec. 8, 1941

"3. Our investigation indicates that the physical services performed at Coalberg have been substantially the same since 1913 as prior thereto, the only change being in the company conducting the operations. The history of Coalberg's operation since 1913, showing the name of the company conducting the operation, the company from whom it was ostensibly performed, and the duration of each operation is outlined in the following table:

Company Operating Coalberg	Company for Whom Coalberg Was Operated	Duration of Operation
Pennslyvania Coal Company.	Self	March 1913—March 1925
Pattison & Bowns, Inc.	Penn. Coal Company	April 1925—Dec. 1929
Pattison & Bowns, Inc.	Pittston Company	Jan. 1930—Feb. 24, 1939
Erie Railroad Company	Self	Feb. 25—28, 1939
Pennslyvania Coal Company	Self	March 1, 1939 to present"

Exhibit P-11—Record Below pages 73 and 74.

"Pattison and Bowns is controlled by the U. S. Distributing Corporation, which, in turn, is controlled by the Pittston Company, Pittston itself is controlled by the Virginia Transportation Corporation, which is controlled by the Chesapeake and Ohio Railway. It also appears that the Pennsylvania Coal Company is controlled by the Erie Railroad Company, like the Chesapeake and Ohio a 'carrier-employer,' and this company is in turn controlled by the Virginia Transportation Corporation, which, as stated above, is controlled by the Chesapeake and Ohio."

Exhibit D-4—Petition to Intervene (Pennsylvania Coal Company), Record Below page 95.

"3. Petitioner is now, and has been for many years, the owner of land, aggregating 67.25 acres in Saddle River Township, Bergen County, New Jersey, upon 41.93 acres of which is located a coal storage plant, known in the railroad tariffs as 'Coalberg,' consisting of trackage layouts, trimmers, movable cranes and other specialized machinery for unloading storage and reloading coal at 12 piles, having an aggregate storage capacity of 400,000 tons."

Since all of appellants' exhibits referred to in this brief were offered together at page 62 of the record, reference to the offered page has been omitted.

ARGUMENT.

Summary of the Argument.

The appellants' attack on the convictions in this case is on two general grounds: 1. that the ordinance comprises a burden upon interstate commerce, and 2, that it deprives them of due process and the equal protection of the laws.

The appeal undertakes to obtain a modification of the rule followed by this court in numerous cases and adhered to in the New Jersey case of the *Susquehanna Coal Co.* v. *So. Amboy*, 228 U. S. 665 33 S. Ct. 512, 57 L. Ed. 1015, to the effect that there is a cessation of federal protection and a subjection to the dominion of the state when coal in movement in interstate commerce is brought to rest by the direction, and for the purposes of the owner thereof.

The appeal further raises the question as to whether there is a lack of due process or denial of the equal protection of the laws resulting from the substitution of license taxes in place of personal property taxes.

I.

The ordinance does not impose a burden upon Interstate commerce in violation of the commerce clause of the Constitution of the United States.

(Appellants' point relied on 1, R. 287).

Appellants' attack is on an ordinance of the Township which required a license for the place and premises in or at which the business of the storage of personal property in warehouses engaged in the business of storing goods for hire was conducted and carried on within the limits of the Township (Ex. S-1; R. 9, 7).

It was admitted that the appellant, Independent Warehouses, Inc. was operating a business at the time and place charged in the complaint in violation of the ordinance, if such ordinance was legal and valid (R. 7).

The situs of appellants' business was within the Township of Saddle River. In *Pennsylvania Coal Co.* v. *Township of Saddle River*, 96 N. J. L. 40, we find it described in 1921 as "a stored supply of anthracite coal physically situate in the Township." In *Pattison & Bowns, Inc.* v. *Township of Saddle River*, 129 N. J. L. 135, the business is described as follows: "Pattison & Bowns, Inc., together with a number of other coal companies, stored coal with Independent Warehouses, Inc. which was engaged in the business of storing goods for hire. In furtherance of the business it leased from Pennsylvania Coal Co. a tract of 56 acres upon which there were tracks, derricks, and other paraphernalia necessary to unload and load large stocks of anthracite coal. The coal is stored in piles 50 to 70 feet high, each pile surrounded by a wooden fence 6 to 8 ft. high". In *Independent Warehouses, Inc.* v. *Saddle River Township*, 52 Fed. Sup. 96, the business is referred to as follows: "The inter-

vening plaintiff, the Pennsylvania Coal Co. is the owner of 67.25 acres of land in the Township of Saddle River, Bergen County, New Jersey which it leased to the plaintiff Independent Warehouses, Inc. The latter company uses the property in question for the storage of coal mined without the State of New Jersey and intended for ultimate delivery within and without the State lines". In *Independent Warehouses, Inc.* v. *Scheele*, 132 N. J. L. 390, the New Jersey Supreme Court said: "It is the practice of the prosecutors to store large quantities of anthracite coal in their yard at Coalberg in the defendant municipality. This yard has a capacity of storing about 100,000 tons of coal". The Court below in *Independent Warehouses, Inc.* v. *Scheele*, 134 N. J. L. 134, after stating that the essential facts are not in dispute said: "The storage plant commonly known as 'Coalberg' is owned by the Pennsylvania Coal Co., a Pennsylvania corporation. It comprises 67¼ acres of land and buildings, tracks, chutes, hoppers, scales, machinery and equipment. The owner leased the yard in its entirety to Independent Warehouses, Inc., a New York corporation, at the nominal annual rental of $1.00".

There can be no question that the yard, physically, was subject to the dominion of the state. Therefore, the "drummer" line of cases relied on by the appellants in their brief are not applicable.

If we understand the appellants' argument correctly, it is their contention that because a railroad tariff may have been filed in respect to the charge for unloading and reloading the coal stored at the yard, and the loss in operation was, by agreement, underwritten by a common carrier, these things removed the yard from the dominion of the state and gave it protection under the interstate commerce clause.

In *Woodruff* v. *Parham*, 8 Wall. 123, a tax on the sale of merchandise, imposed alike whether of interstate origin or not, was declared not to fetter commerce among the states. In the *State Freight* Tax Case, *Reading Railroad Co.* v. *Pennsylvania*, 15 Wall. 232, the court held that a tax upon freight in movement from state to state is an improper regulation of commerce among the states. But in the Railway Gross Receipts Case, *Reading Railroad Co.* v. *Pennsylvania*, 15 Wall. 284, the rule was laid down that under the power of the state to tax, a tax on the gross receipts of a railroad doing an interstate business was not violative of the constitutional provision. Since then, there may have been an increase in the extent of the exercise by Congress of its power to impose police regulations on interstate commerce, thereby excluding state regulation (e.g. *Stafford* v. *Wallace*, 258 U. S. 495, cited by appellants), but there has been no diminution in the power of the state to tax. *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506. Any change in the interpretation of what is the line of demarcation between the power of Congress and the state's right to tax, so long established, would seemingly, at this date have to be by constitutional amendment.

If the yard of Independent Warehouses, Inc., in question in this case is without the dominion of the state, by the same token the place of business of every recipient of goods which ever moved in interstate commerce would equally be entitled to immunity from state taxation. In the case of *Louis K. Liggett* v. *Lee*, 288 U. S. 517; 53 Sup. Ct. Rep. 481, this Court said at page 486:

> "It is asserted that the act bears unevenly upon those who purchase directly from a wholesale house or manufacturer whose plant is outside the state, some of whom also store the goods in Florida preparatory to

retail sale, and those who purchase from a wholesaler within the state; that the former are engaged in interstate commerce, and the tax is as to them a burden upon that commerce. The claim merits no serious discussion. The tax is obviously laid for the privilege of operating stores in Florida, and attempts no discrimination between merchandise imported from another state and that produced in Florida. Compare *Emert* v. *Missouri*, 156 U. S. 296, 15 S. Ct. 367, 39 L. Ed. 430; *Armour & Co. v. Virginia*, 246 U. S. 1, 38 S. Ct. 267, 62 L. Ed. 547; *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095. It levies no tax and lays no burden on the purchase in interstate commerce of articles for sale in Florida. *Kehrer v. Stewart*, 197 U. S. 60, 65, 25 S. Ct. 403, 49 L. Ed. 663; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 471, 51 S. Ct. 499, 75 L. Ed. 1171. The tax on the value of merchandise in a retail store, or warehoused in Florida for sale in that store, even though incident on articles which have moved in interstate commerce, is laid after interstate commerce has ceased. Compare *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538; *Bacon v. Illinois*, 227 U. S. 504, 33 S. Ct. 299, 57 L. Ed. 615; *Texas Co. v. Brown*, 258 U. S. 466, 475, 42 S. Ct. 375, 66 L. Ed. 721; *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 478, 52 S. Ct. 631, 76 L. Ed. 1232.

Furthermore appellants cannot rely on the fact that the ordinance may result in a tax on the common carrier, Erie, for the reason that this court has said it is unlawful for the common carrier to assume the loss on in-transit warehousing. The Appellants' own evidence discloses that the coal shipped was charged the regular freight rate with an unloading charge but was furnished free storage (P. 12, R. 56)—the

deficit in the cost of such storage being paid by the railroad company. (Ex. P-4, R. 22). This is plainly a rebate to coal shippers, held illegal by this court in *Baltimore & Ohio Railroad Co.* v. *U. S.*, 305 U. S. 507, 59 S. Ct. Rep. 284 where the court said at page 291:

> "If the service is non-transportation, the fact that it is in a tariff does not save it from the condemnation of Section 6 (7). That section forbids receiving a less compensation for transportation than the tariff. The loss on in-transit warehousing, entered into to secure the rail-haul, results in lowered receipts for the transportation and in violation of the section. Some shippers are not in a position to avail themselves of the below cost in-transit service. They must pay the full transportation rate, without any offset from the warehousing. This discrimination between shippers is unlawful."

It cannot be said that, if the cost of the license were passed along to the owner of the goods in storage, there would result any improper burden. In such case, the owner would be in no different position than if, instead of shipping his goods into the warehouse of Independent Warehouses, Inc., he shipped them into his own warehouse when they certainly would be subject to the dominion of and taxation by the state. Even if we say the license fee is a tax on the owners of the coal rather than a tax on the operator of the warehouse, still it would not be an improper burden. In *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 S. Ct. Rep. 388, this Court said at page 392:

> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their

just share of state tax burdens merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business * * * a tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded. Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is prerequisite to it. *Western Live Stock v. Bureau of Revenue*, 303 U. S. p. 253, 58 S. Ct., page 547, 82 L. Ed. 823, 115 A. L. R. 944, and cases cited."

And in speaking of a New York City Sales Tax imposed on coal, this court said in the foregoing case at pages 393, 394:

"It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in in-

terstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce sustained in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 54 S. Ct. 575, 78 L. Ed. 1141; *Henneford* v. *Silas Mason Co.*, *supra*; *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62, 59 S. Ct. 376, 83 L. Ed. 488; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed. 586, or the tax on storage or withdrawal for use by the consignee of gasoline, similarly sustained in *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 52 S. Ct. 631, 76 L. Ed. 1232, 84 A. L. R. 831; *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191; *Edelman* v. *Boeing Air Transport Co.*, 289 U. S. 249, 53 S. Ct. 591, 77 L. Ed. 1155, or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. *Brown* v. *Houston*, *supra*; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538."

There are no facts in the present case which distinguish it from the decision of this court in *Susquehanna Coal Co.* v. *So. Amboy*, 228 U. S. 665. That case was an appeal from the New Jersey courts wherein, in *Susquehanna Coal Co.* v. *So. Amboy*, 76 N. J. L. 412, the New Jersey Supreme Court stated the facts as follows:

"All that they have succeeded in showing is that their eastern agents have certain customers who, as a matter of experience, call for a certain amount of coal per week or month or year, and that in anticipation of orders for the delivery of this coal and for the purpose of being ready to fill orders as soon as received,

the coal is put in transit before the orders are actually placed. It was not consigned from the mine to any definite customers in New York or New England. On the contrary it appears to have been consigned by the Susquehanna Coal Company, in Pennsylvania, to the Susquehanna Coal Company, in South Amboy, in anticipation, as we have said, of orders from regular customers, and awaiting such orders indefinitely."

That case was carried to this court, as stated by the court, "on the ground that the coal was in transit from points in the state of Pennsylvania through the state of New Jersey to destinations outside of the latter state and being, as it is alleged, in interstate commerce, the taxes on which were levied in contravention of the commerce clause" 228 U. S. 665, 666.

The undisputed proof in the present case coming from the appellants' own witness is identical with the facts in the Susquehanna Coal Co. case and is as follows:

"Q. Does the Pennsylvania Coal Company own a storage plant in Saddle River Township? A. Yes (R. 80).

"Q. For what purpose was it acquired? A. It was purchased to provide a location convenient to tidewater markets for the storage of excess production of coal during certain seasons of the year, in readiness for deliveries during the winter months when the demand normally exceeds production, and for emergencies caused by mining or transportation interruptions, bad weather or other conditions (R. 80, 81).

"Q. What is the reason for that storage? Why is it stored there? Why do they store it there? A. Well, you answered it when you put the question yourself; because of the seasonal conditions the supply exceeds

the demand, and, therefore, the operators bill it to storage, to store it at an advantageous point for reshipment. It also relieves the car situation. It also helps the operator to continue operating (R. 120).

"Q. The reason for that is because the shipper at that time is not able to determine the final destination of the coal? A. I wouldn't put it just that way. I would say that the shipper hasn't enough orders to ship it out direct to destination (R. 120).

"Q. In other words, it (the coal) comes in and it is held there awaiting orders from the consignee as to what is to happen to it. Is that right? A. That is right (R. 119).

"Q. And it may remain there for a period of two years? A. That is right (R. 119).

"Q. All this coal comes in consigned to Coalberg, is that correct; I mean the destination? A. It is consigned to Coalberg, Rochelle Park, for storage. (R. p. 166)

"Q. What destination? A. Rochelle Park, Coalberg, New Jersey, for storage; billed at the regular tariff rates from the mine to the storage plant (R. 118).

"Q. Another shipper might put in 100,000 tons in the early spring and sell 100,000 tons before the next shipment, and another shipper might put in 50,000 or 100,000 tons in the late summer and sell 75,000 tons in that month, which would leave 25,000 tons over for the following season. It is an overlapping storage. A. Yes (R. 166).

"Q. But, if the shipper's busines was bad, he might ship in 50,000 tons, and it might lay there for a year and a half, isn't that right? A. If his business was bad? Not today (R. 167).

"Q. Depending upon what the condition might be in the trade? A. Yes (R. 167).

"Q. You previously testified to a portion of this coal being sold in the neighborhood. A. The bulk of the business was with the Edgewater Coal Docks (R. 162, 163).

"Q. Don't you load coal for points in New Jersey? A. Oh, yes, we have some accounts in New Jersey. We have had them in Maine, and Massachusetts, Long Island" (R. 163).

This court in *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, had the following to say at page 669:

"It is clear, we repeat, that such trade could only be accommodated through the storage of coal somewhere, and plaintiff in error availed itself of the conditions to put the storage in New Jersey.

"The coal, therefore, was not in actual movement through the State; it was at rest in the State, and was to be handled and distributed from there. Therefore, the principles expressed in *General Oil Co. v. Crain*, 209 U. S. 211, and *Bacon v. Illinois*, 227 U. S. 504, are applicable to it. The products in neither of those cases were destined for sale in the States where stored; the delay there was to be temporary, a postponement of their transportation to their destinations. There was, however, a business purpose and advantage in the delay which was availed of, and while it was availed of, the products secured the protection of the State. In both cases it was held that there was a cessation of interstate commerce and subjection to the dominion of the State.

"In *Bacon v. Illinois*, the grain which was taxed had been shipped by the original owners, who were residents

of southern and western States, under contracts for its transportation to New York and Philadelphia and other eastern cities, with a reservation to the owners to remove it from the cars at Chicago for certain temporary purposes 'or change the ownership, consignee or destination thereof.' The grain, while in transit, was purchased by Bacon, he succeeding to the rights of the vendors. Upon arrival of the grain at Chicago he exercised the right to remove it from the cars to his private elevator to avail himself of the privilege reserved. The privilege being exercised, he turned the grain over to the railroad companies for transportation in accordance with original contracts. After commenting upon the power he had over the grain while in Chicago, we said (p. 516), 'He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination.' For this conclusion cases were cited. It was further said (p. 517), 'The property was held within the State for purposes deemed by the owner to be beneficial. * * *.'

"In *General Oil Co. v. Crain*, oil contained in tanks at Memphis, Tennessee, was subject to an inspection tax. The oil was shipped to Memphis from producing and refining points in Ohio and Pennsylvania and handled in tank cars and other receptacles to be forwarded to customers in Arkansas, Louisiana and Mississippi, in which States the Oil company had many regular customers from whom it always had on hand many unfilled orders for oil to be delivered as soon as possible or convenient. At Memphis the Oil company main-

tained two tanks, one of which was plainly marked: 'Oil already sold in Arkansas, Louisiana and Mississippi,' and which remained in Memphis only long enough (a few days) to be properly distributed according to the orders therefor. The other tank or vessel was for oil sold in those States and kept separate and apart until orders should be received from customers in those States. The oil was never sold otherwise than upon such orders. We said of this situation that the company was doing business in the State and that its property was receiving the protection of the State. Its oil was not in movement through the State. To the contention that the oil was only there for distribution and to fulfill orders already received, we said (p. 231), 'It required storage there—the maintenance of the means of storage of putting it in and taking it from storage.'"

There is also no distinction between an assessment under a tax act and a license fee. The case of *Federal Compressed Warehouse Co.* v. *McLean*, 291 U. S. 17, 54 Sup. Ct. Rep. 267, is identical with the present case. A tax on each person operating a warehouse which was graduated according to the storage capacity of the warehouse was assailed as infringing the commerce clause. The court recites the facts as follows:

"The purchases are made for resale or to fulfill contracts for sale of cotton without the state. In the usual course of business the purchased cotton, after it is ginned, is transported to appellant's warehouse for storage and compression, about 25 per cent. arriving by automobile truck or wagon and the remainder by rail over the line of the single railroad serving Cleveland. Upon delivery Appellant issues its negotiable

warehouse receipts for the cotton, in the form and manner provided by the United States Warehouse Act. The right to demand delivery of the cotton or otherwise control its disposition is reserved to the holders of the receipts. A small part of the stored cotton, from 1 per cent. to 10 per cent. is resold within the state to buyers who sell it to purchasers without the State, but all except a negligible part of it is ultimately shipped to points outside the state. Upon shipping orders given by the holders of the warehouse receipts, appellant compresses the cotton into bales of standard weight and size, suitable for shipment, and delivers them to the rail carrier for interstate transportation. The movement of the cotton out of the warehouse is directed by the owners of it who hold the warehouse receipts. Its destination is not determined until the owner gives shipping instructions to appellant, and shipment is not made until surrender of the warehouse receipts. The compress charges are paid by the carrier, which it adds to the charge for carriage, and, in the case of cotton brought to the warehouse by rail carriage, the through interstate rail rate is applied from the point of origin to destination instead of the combination rate which is the sum of the intrastate rate to Cleveland and the interstate rate from that point to destination. The identity of the cotton is not preserved in re-shipping it, and substitution is permitted with the understanding that the through rate from point of origin to destination without the state shall not be affected."

The Court held as follows at page 268:

"It is clear that by all accepted tests the cotton, while in appellant's warehouse, has not begun to move in interstate commerce, and hence is not a subject of inter-

state commence immune from local taxation. When it comes to rest there, its intrastate journey, whether by truck or by rail, comes to an end, and, although in the ordinary course of business the cotton would ultimately reach points outside the state, its journey interstate does not begin, and it does not become exempt from local tax until its shipment to points of destination outside the state. Before shipping orders are given, it has no ascertainable destination without the state, and in the meantime, until surrender of the warehouse receipts, it is subject to the exclusive control of the owner. Property thus withdrawn from transportation, whether intrastate or interstate, until restored to a transportation movement interstate, has often been held to be subject to local taxation. (Citing cases.)

"A nondiscriminatory tax upon the business of storing and compressing the cotton, which is not itself the subject of a movement in interstate commerce, is not forbidden."

The requirement that a license must be obtained does not violate the Federal Constitution. In the case of *Cargill v. Minnesota*, 180 U. S. 452, the statute provided that it should be unlawful to receive, store, ship or handle any grain in any elevator or warehouse unless the owner shall have procured a license therefor from the State Railroad and Warehouse Commission. The complaint alleged that "the elevator was essential and necessary to the Railroad Company in order to promptly, safely and properly handle grains received by it for shipment; and constituted, in that respect, a necessary adjunct to the railroad." The Court had the following to say at page 470:

"It is also contended that the requirement of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the States. This view cannot be accepted. The statute puts no obstacle in the way of the purchase by the defendant company of grain in the State or the shipment out of the State of such grain as it purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only requires a license in respect of business conducted at an established warehouse in the State, between the defendant and the sellers of the grain. We do not perceive that in so doing the State has entrenched upon the domain of Federal authority, or regulated or sought to regulate interstate commerce. In no real or substantial sense is such commerce obstructed by the requirement of a license."

It is to be noted that there was previous litigation between the same parties in reference to the exemption from personal property taxes on the coal in storage, *Independant Warehouses, Inc. v. Township of Saddle River*, 129 N. J. L. 137, 130 N. J. L. 217. If the coal in this case were in interstate commerce, that, in itself, would have been sufficient to obtain the tax exemption sought in that litigation. However, the question was not raised—undoubtedly because of the decision in *Pennsylvania Coal Co.* (one of the appellants here) v. *Township of Saddle River*, 96 N. J. L. 40 in which case the court said:

"The question is as to the liability to taxation on October 1st, 1919, of a stored supply of anthracite coal, at that date physically situate in the Township above named. Apart from the effect, if any, of a technical state of war, and the attendant war legislation of the

United States, executive orders of the President and other national officials, and conditions incident thereto, there is no doubt that the status of this property as to taxability is indistinguishable from that dealt with in such cases as Lehigh and Wilkes Barre Coal Co. v. Junction, 75 N. J. L. 68, 922; Susquehanna Coal Co. v. South Amboy, 76 Id. 412; affirmed in 77 Id. 796, and Same v. Same, 228 U. S. 665; 57 L. Ed. 1015; no interstate commerce feature being involved."

The appellants' own proof in this case established beyond the question of a doubt that the physical facts existing at the yard are the same as those which existed prior to the lease to Independent Warehouses, Inc.

The manager in charge of the Coalberg plant testified as follows (R. p. 153):

"Q. You have been employed by the Independent Warehouses, Inc. for a number of years, haven't you? A. Yes sir.

Q. How many years was that? A. Going on 15 that I have been at the plant.

Q. And during that time you were employed by the Independent Warehouses, Inc? A. That is right.

Q. In the same capacity as you are now employed? A. Yes sir."

And at page 154:

"Q. And about these agreements back and forth between Penns Ivania Coal Co. and Independent Warehouses Inc., you know nothing about them? They did not go through your hands at all? A. No, I did not know anything about them.

Q. The present method is the same as the old method as far as your duties go? A. Yes, in so far as my duties are concerned."

The coal agent of the intervenor Erie testified as follows (R. 118, 119).

"Q. Tell us how the coal comes from the mine to Saddle River Township. A. It is billed by the shipper on waybills and shipped to the name of the consignee.

Q. What destination? A. Rochelle Park, Coalberg, New Jersey, for storage, billed at the regular tariff rates from mine to storage plant.

Q. How was it billed before 1939? A. The same way."

In an effort to get away from the decision in *Pennsylvania Coal Co. v. Saddle River Township*, the Erie offered in evidence Exhibit P-4 (R. 20) which is an agreement dated July 10th, 1939, made between the Pennsylvania Coal Company and the Trustees of the Erie. This agreement provided that Pennsylvania Coal Co. would continue to operate the Coalberg storage yard for the benefit of Erie (R. 22) and that the net loss of operation, would be paid by Erie (R. 22), such deficit amounting to $7,639.32 for the year 1941, $18,377.38 for the year 1942, and $30,735.59 for the year 1943 (Ex. P-10 R. 49). Since there was no change in the physical services performed at Coalberg, it must necessarily be the appellants' contention that this financial arrangement took the coal, which had not heretofore been in interstate commerce and put it into that category. Obviously because a railroad company, engaged in interstate commerce, may be instrumental in rendering some services, that, in itself, would not create the status of interstate commerce so as to give immunity from taxation unless the same would also be true of other than a railroad company. The

status of interstate commerce, as defined in *Susquehanna Coal Co.* v. *South Amboy, supra*, is dependent upon physical facts and such status cannot be obtained simply as the result of a financial arrangement between the parties or by a tariff which is merely the published agreement between the railroad and shipper. In the case of *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17, 54 S. Ct. Rep. 267, 269 the Court said:

> "The fact that appellant's contract with the interstate rail carrier has designated appellant as the carrier's agent and appellant's warehouse as the carrier's depot cannot alter the legal consequences of what is actually done with the cotton by its owners or of their power of control over it, or of the actual course of dealing with it by appellant. It is not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause".

Factually, the coal, when it came to rest at the yard in Saddle River Township had ceased to be in interstate commerce. It goes without saying that since the coal stored at this yard is not in interstate commerce, the business or place of storage is also not in interstate commerce.

The owners of the coal voluntarily selected Saddle River Township as the point for bringing the coal to rest. They were dealers of coal in quantities of from 50,000 to 100,000 tons (R. 166). To store coal in that quantity at their own places of business in New York City or in any city would require invaluable space which would be highly difficult to obtain. It would necessitate valuable side-trackage and unloading equipment. Operators would be confronted with zoning, building, and fire regulations. On a sale in New York City they would be subject to a municipal sales tax.

McGoldrick v. *Berwind-White Coal Mining Co.*, *supra*, and in many jurisdictions personal property taxes and state income taxes. But all this was avoided by storing in Saddle River Township. The yard had an area of 56 acres and a capacity of 100,000 tons with side-trackage and the necessary loading and unloading machinery and the storage was free. Since the use existed prior to the adoption of zoning in the Township, as long as the same business continued, it would, as a non-conforming use, not be affected thereby. R. S. 40:55-48. By virtue of being stored in a commercial warehouse, the coal was exempt from personal property taxes. *Independent Warehouses, Inc.* v. *Saddle River Township*, *supra*. The State of New Jersey has no sales tax or income tax. The advantages of bringing the coal to rest in Saddle River Township, rather than at the main office of the owner thereof wherever the same might be situate, were manifestly plain. Saddle River was voluntarily selected for its storage because of the valuable benefits obtained therefrom. In so doing the business of such storage was subject to the dominion of the government of the Township for the purpose of taxation.

The case of *Lehigh and Wilkes Barre Coal Co.* v. *Borough of Junction*, 75 N. J. L. 922, was followed by the court below (R. 272). In that case the facts were identical with those in the present case and there are reviewed many of the decisions of this court on the question raised in this case. The substance of those decisions is that if the owner of property in transit from one state to another, of his own volition or for his own purposes, causes the discontinuance of the actual transportation of such property and brings the same to rest within a state, it ceases to be in interstate commerce irrespective of what the ultimate purpose may be. This brings the present case squarely within the language of *J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 59 S. Ct. Rep. 257, 259 wherein the Court said:

"The construction of the statute by the state court is binding upon us (citing cases). And in the light of its construction the state court applied the principles declared in our decisions" (citing cases).

State License Fees.

Under this subhead the appellants argue that the Railroad Tax Act (N. J. P. L. 1941, Chapter 291, p. 776, as amended) provided that a tax assessed pursuant to that Act should be in lieu of all other state or local taxation. This was not assigned as a reason by the appellants in the state court (R. 15).

Reference is also made to Chapter 162, N. J. P. L. of 1945, p. 563 which provides that a corporate franchise tax "shall be in lieu of all other state, county, or local taxation upon or measured by intangible personal property" but this statute was not in effect when the convictions were had in the present case.

The Court below considered the question and said:

"Obviously, the franchise grant to the railroad company does not render immune from regulation and taxation under Section 40:52-1 (g) and 40:52-2, supra, a public warehouse business conducted by another, even though the operator be one of its corporate subsidiaries. The question is essentially one of legislative intention; and there is no indication whatever of a purpose to exempt a public warehouse of this category from the operation of the cited statute, simply because the railroad company uses the facility for what it terms in-transit storage after the movement in commerce has come to an end."

Under the rule in *J. Bacon & Sons v. Hartia*, supra, the lower court's construction disposes of the question.

II.

The ordinance does not deny the appellants due process or the equal protection of the laws.

(Appellants' point relied on 3, R. 288).

The appellants also attack the convictions on the ground that the license fee prescribed in the ordinance under which the same were had, denied them of due process and the equal protection of the laws.

The same attack was made on the convictions in the Court below and that Court had the following to say in reference thereto (R. 273):

> "A tax on a public warehouse graduated according to storage capacity is familiar legislative practice. Vide Federal Compress and W. Co. v. McLean, supra. The license has reference only to the public warehouse business transacted at the warehouseman's established place of business within the state. W. W. Cargill Co. v. Minnesota, 180 U. S. 452; 21 S. Ct. 423, 45 L. Ed. 619. And under the ordinance in the case at hand, the warehouse corporation may protect itself against the inclusion of areas not devoted to storage in the calculation of the tax. There is a presumption that the tax is reasonable in amount; and the burden rests upon the challenger to overthrow that presumption. It has not been sustained here. There is not such disparity between the 'value of the privilege' and the levy as would render the ordinance arbitrary and discriminatory. The parties are in disagreement as to the quantum of the tax upon the stored coal per ton. Based upon respondent's estimate of total plant area and capacity, the tax per ton would amount to 2½ cents, while the

personal property tax would range between 29 cents and 58 cents per ton. From 1903 to 1940, when tax exemption was claimed under section 54:4-3.20, the plant was successfully managed notwithstanding that property taxes were paid on the stored coal in an amount not less than the current license tax."

The ordinance in question is expressly authorized by statutes of the State of New Jersey and it is to be noted that the appellants' attack is not against the statutes. The pertinent authorizing statutory provisions are as follows:

"R. S. 40:52-1. The governing body may make, amend, repeal and enforce ordinances to license and regulate:

"g. Lumber and coal yards, stores for the sale of meats, groceries and provisions, dry goods, merchandise and goods and chattels of every kind, and all other kinds of business conducted in the municipality other than herein mentioned, and the places and premises in or at which the business is conducted and carried on."

"R. S. 40:52-2. The governing body may fix the fees for all such licenses, which may be imposed for revenue, and may prohibit all unlicensed persons and places and vehicles, businesses and occupations from acting, being used, conducted or carried on; impose penalties for violation of ordinances providing for licenses, and revoke any license for sufficient cause and after notice and hearing."

"R. S. 40:49-5. The governing body may prescribe penalties for the violation of ordinances it may have authority to pass, either by imprisonment in the county

jail or in any place provided by the municipality for the detention of prisoners, for any term not exceeding ninety days, or by a fine not exceeding two hundred dollars, or both. The magistrate before whom any person is convicted of violating any ordinance of a municipality, shall have power to impose any fine or term of imprisonment not exceeding the maximum fixed in such ordinance.

"Any person convicted of the violation of any ordinance may, in the discretion of the magistrate by whom he was convicted, and in default of the payment of any fine imposed therefor, be imprisoned in the county jail or place of detention provided by the municipality, for any term not exceeding ninety days.

"There may issue out of the court of any magistrate empowered to impose fines for the violation of any municipal ordinance, execution against the goods and chattels of any person convicted in said court or before said magistrate. Execution shall be levied and enforced in the same manner as are executions from the small cause court."

Sections 1, 2, 3 and 7 of the ordinance (Ex. S-1, R. p. 9) brought in issue by the convictions under review in this case, follow substantially verbatim the words of the above statutes. The public policy underlying the passage of an ordinance under these statutory provisions is in New Jersey a matter to be determined by the municipal governing body. *Thorne* v. *Kearny*, 100 N. J. L. 228. This rule is also adhered to by this court. In the case of *State Board of Tax Commissioners of Indiana* v. *Jackson*, 283 U. S. 527; 51 S. Ct. Rep. 510, 543, the Court said:

"It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the Legislature if there are substantial differences between occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear."

The Classification.

The class of business provided to be licensed by the ordinance is a classification established by the tax laws of New Jersey as follows: R. S. 54:4-3.20 "All personal property stored in the warehouse of any person, co-partnership, or corporation engaged in the business of storing goods for hire shall be exempt from taxation under this chapter."

The Court of Errors and Appeals of New Jersey, which is the highest court of that state, affirmed the New Jersey Supreme Court in *Schwartz* v. *Essex County Board of Taxation*, 129 N. J. L. 129, 130 N. J. L. 177 wherein a taxpayer made the same charge against the classification as is made by the appellants in this case. The Court said:

"There no longer exists any doubt but that the legislature is competent to classify objects of legislation and this includes classification for the purpose of taxation and exemption from taxation. * * * We are of the opinion that the statute under attack meets these tests."

This rule was also followed in *Independent Warehouses, Inc.* v. *Township of Saddle River*, 129 N. J. L. 137, 130 N. J. L. 217, *Pattison & Bowens* v. *Township of Saddle River*, 129 N. J. L. 135, 130 N. J. L. 177.

By R. S. 54:4-3.20, goods stored in a commercial warehouse were selected by the legislature of New Jersey as the proper subject for tax exemption under the tax laws of that state on the ground that it was not entirely practical to correctly levy separate and individual assessments on the varied and often-times transient owners of such goods and that therefore, in some instances, because of the resulting confusion in such assessments, the enforcement of the provisions of the Tax Act in respect thereto brought about hardship and injustice. However, R. S. 54:4-3.20 was never intended by the legislature of New Jersey to grant to the owners of goods stored in public warehouses absolute immunity from paying their share of the burdens of government. The original act, Chapter 221 N. J. P. L. 1925 specifically limited the exemption to "taxation under this Act", the statute being an amendment of "An Act for the assessment and collection of taxes (Revision of 1918)". This limitation was carried forward into the Revised Statutes of New Jersey of 1937 by the use in R. S. 54:4-3.20 of the words "shall be exempt from taxation under this chapter".

Unless we are to presume the legislature of New Jersey was not fully cognizant of its own actions, we must deem that they considered the result of making the tax-exemption statute part of the legislative scheme of the state and that they reached the conclusion that the public interest would be best served and fully protected by license fees for revenue imposed under the provisions of R. S. 40:52-2 above mentioned, which was then Section 2 of Article 15 of Chapter 152 N. J. P. L. 1917, and R. S. 40:52-1 (a), which was then Chapter 252 N. J. P. L. 1918. The legislature of New Jersey could have granted commercial warehouses a tax exemption without limitation but, having failed to do so and having specifically qualified the exemption to "taxation under the Tax Act" it necessarily follows that the state's lawmaking

body intended to leave to the municipalities the power to tax under other existing statutes. Consequently the adoption of an ordinance under the reserved power could not, in itself, be construed to be arbitrary or capricious so as to deprive a party affected thereby of his constitutional rights.

And likewise it cannot be said that the classification in the ordinance in the present case discriminates. Logic dictates that a classification good when used in a statute, would not be bad when used in an ordinance under the same circumstances. The ordinance applied the license fee verbatim to the same classification ("warehouses engaged in the business of storing goods for hire") as was used by the legislature of New Jersey in granting the tax exemption. The language of both the ordinance and the statute is equally embracive. The facts and circumstances which warranted the legislature in legislating in respect to the taxation of commercial warehouses were, to the same extent, true when the municipality gave consideration to the same subject.

On the general question of classification, this Court said in the case of *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U. S. 527, 51 S. Ct. Rep. 540, 543, *supra*, as follows:

> "The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. R. v. Penn., 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892; Southwestern Oil Co. v. Texas, 217 U. S. 114, 30 S. Ct. 496, 54 L. Ed. 688; Brown-Forman Co. v.

Kentucky, 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman, 240 U. S. 342, 36 S. Ct. 370, 374, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 155; Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350. As was said in Brown-Forman Co. v. Kentucky, supra, at page 573 of 217 U. S. 30 S. Ct. 578, 580:

> 'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'"

"The ordinance in question in this case differentiated between private warehouses and commercial warehouses. A commercial warehouse is a business in itself, while a private warehouse, at its best, is merely incidental to a business. The differences between the two are too obvious to require argument. On the question of the classification of warehouses, this Court, in *Louis K. Liggett Co. v. Lee*, 288 U. S. 517, 53 S. Ct. Rep. 481, 485 *supra*, had the following to say:

> "Section 5, in addition to the graduated license fee, lays a tax of $3.00 on each $1,000 value of stock carried in each store, or for sale in such store, and section 2 in

cludes within the goods, wares, and merchandise from which sales are to be made those owned by the taxpayer and held in storage to be sold in or through such store. The appellants insist that this requirement deprives them of the equal protection of the law for the reason that wholesale merchants not taxed by the act in question are assessed under section 926 of the Revised General Statutes of Florida (Comp. Gen. Laws Fla. 1927, 1127) a tax of only $1.50 per $1,000 of value on stock carried in their stores or warehouses. The result is said to be that a chain store operator must pay double the amount paid by the wholesaler who supplies individual stores competing with the chain.

"Chain stores do not sell at wholesale. What they store, if they warehouse any goods in the state of Florida is for the purpose of retail sale at their shops. On the other hand, goods held by a wholesaler are stored for sale to retail establishments to be resold by the latter. What has been said with respect to difference in methods and operation of the two kinds of warehouses applies in this instance. The diverse purposes of the storage and the difference in the nature of the business conducted are sufficient to justify a different classification of the two sorts of warehouses for taxation."

In the case of *Cargill* v. *Minnesota*, 180 U. S. 452, *supra*, this Court said at page 469:

"If in the judgment of the State it was necessary for the public interests, or beneficial to the public, that elevators and warehouses of the kinds described should be operated only under a license and under such regulations as may be rightfully prescribed, it would be going very far to hold that such a classification was so un

reasonable as to justify us in adjudging that the requirement of a license was void as denying the equal protection of the laws. No such judgment could be properly rendered unless the classification was merely arbitrary or was devoid of those elements that are inherent in the distinction implied in classification. We cannot perceive that the requirement of a license is not based upon some reasonable ground—some difference that bears a proper relation to the classification made by the statute. Gulf, Col. & Santa Fe Ry. v. Ellis, 165 U. S. 150, 165."

It is difficult to ascertain from the record or from appellants' brief what specific complaint they have with the classification contained in the ordinance in this case, but, since this court is not concerned with the propriety or justness of the tax or the motives or public policy underlying the same, we discuss the subject of classification because it would appear to be appellants' only proper basis of attack under this point. In New Jersey, under the General Tax Act; all personal property is subject to taxation for the support of the municipal, school, county, and state governments at a rate fixed by the municipality in accordance with the mechanics of the statute (R. S. 54:4-1, *et seq.*). This, of course, also includes personal property stored in private warehouses, but, as before mentioned, by R. S. 54:4-3.20, such property stored in commercial warehouses is exempt from this taxation.

Appellants charge that the ordinance in question is an intentional attempt to secure revenue lost by inability to impose personal taxes on the coal. At page 14] of their brief they say that the annual license fee would be $12,545.97. As found by the Court below, from the year 1903 until 1940, during which period of time the storage yard was success-

fully operated as a private warehouse, personal property taxes were paid on the coal in storage under the Tax Law of New Jersey in an amount of approximately $12,000 per year (R. 273, 188). In 1940, Independent Warehouses, Inc., for the first time, claimed and obtained an exemption from personal property taxes under R. S. 54:4-3.20, *Independent Warehouses, Inc.* v. *Saddle River Township*, 129 N. J. L. 137. This tax exemption brought about approximately an 8% diminution of the tax receipts of the municipality (R. 191). As the result thereof, there arose the necessity to bring into operation the state's constitutional power to tax, and thereby the problem was rendered free of any question of an attempt to regulate interstate commerce. Furthermore, this fact, in itself, constituted sufficient basis for classification. In a well-considered opinion, based largely on decisions of this Court, and with able counsel participating, in *Knoxville & Ohio R. Co.* v. *Harris*, 99 Tenn., 684, 53 L. R. A. 921 (Writ of Error dismissed by U. S. Supreme Court February 1st, 1900), the Tennessee Supreme Court dealt with a situation similar to the present case. Therein the Court disposes of any arguments which might be raised by the appellants in this case, in words clearer and fewer than we could hope to use, saying:

> "Exemption from ad valorem taxation no more includes exemption from privilege taxation than the imposition of an ad valorem tax includes the imposition of a privilege tax. If one imposition does not embrace both, one exemption does not embrace both. No more is it an answer to this interpretation to say that it leaves the immunity allowed less valuable to the complainant than it would otherwise be. That was a matter for the consideration of the legislature making the grant. Memphis Gaslight Co. v. Shelby County Taxing Dist., 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205. * * * The

precise objection pressed against the acts is that they constitute vicious class legislation, in that, as alleged in the bill, they apply to only two of the seventy-five railroad companies operating or controlling lines of road in the state, and the classification is unnatural and arbitrary. The acts do divide the railroad companies in the state into two classes: (1) Those 'not paying an ad valorem tax to the state,' and (2) those paying such tax; and they impose a privilege tax upon those of the former class only. This is class legislation, undoubtedly, but it is not of the vicious or forbidden kind. It applies equally to all corporations that are or may be in like situation or circumstances, and thereby meets the first requirement of valid class legislation; and it makes a natural and reasonable classification, thereby meeting the other requirements of such legislation. Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Jones v. Brim, 165 U. S. 180, 41 L. Ed. 677, 17 Sup. Ct. Rep. 282; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 588, 41 L. Ed. 560, 17 Sup. Ct. Rep. 418; Haves v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Columbus Southern R. Co. v. Wright, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396. That it meets the first of these requirements is self-evident, and that it meets the other one becomes manifest when it is considered that those companies upon which the privilege tax is imposed are not otherwise making any contribution to the support of the state government that protects their business and property in the same manner that it does those of the companies of the other class, which are contributing their

part to that support by the payment of an ad valorem tax. What sounder and more natural reason could be found for a classification than that these are already bearing some of the burdens of government and those are not? A classification with such a reason to support it (and it may have been prompted by others which the court may not and need not state or discover) cannot justly be characterized as unnatural and arbitrary. * * * It has been suggested, with the emphasis of repetition, that these acts were not passed in good faith, but with the unjust motive of depriving the companies affected thereby *of an advantage* previously conferred. Of this we see no indication. Moreover, the courts have nothing to do with the motives of the legislature, nor with the policy or impolicy of its laws. * * * A like reply must be made to the other suggestion, that this tax, if now sanctioned, may hereafter be so increased as to equal an ad valorem tax, which would make the burden upon complainant as great as if it had no exemption at all. If the legislature has the legal right to impose a privilege tax the amount of the imposition is a matter within its discretion. 'Our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' Delaware Railroad Tax, 18 Wall. 231, sub nom. Minot v. Philadelphia, W. & B. R. Co., 21 L. ed. 896; California v. Central P. R. Co., 127 U. S. 1, 41, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593."

In the case of *Alaska Fish Co. v. Smith*, 255 U. S. 44, the acts attacked levied license taxes of $2.00 a barrel and $2.00 a ton respectively, upon persons manufacturing fish oil, fertilizer and fish meal in whole or in part from herring. The Court had the following to say:

"The complainant alleges that the tax will prohibit and confiscate the plaintiff's business, which is that of manufacturing fish oil, fertilizer, fish meal and by-products from herring either in whole or in part; that the tax unreasonably discriminates against the plaintiff, as it levies no tax upon the producers of fish oil, &c., from other fish, and is otherwise extortionate; * * *

"The prophecies of destruction and the allegations of discrimination as compared with similar manufactures from salmon are denied by the Attorney General for Alaska, the latter denial being based upon a comparison of the statutes which of course is open. We are content, however, to assume for the purposes of decision, that not to speak of other licenses, the questioned acts do bear more heavily upon the use of herring for oil and fertilizer than they do upon the use of other fish. But there is nothing in the Constitution to hinder that. If Alaska deems it for its welfare to discourage the destruction of herring for manure and to preserve them for food for man or for salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon similar use of other fish or of the offal of salmon, it can hardly be said to be contravening a Constitution that has known protective tariffs for a hundred years. Rast v. Van Deman & Lewis Co., 240 U. S. 342, 357. Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk (Citing cases)." * * *

"* * * We know of no objection to exacting a discouraging rate as the alternative to giving up a business when the legislature has the full power of taxation. * * * The

legislature was warranted in treating the making of oil and fertilizer from herring as a different class of subjects from the making of the same from salmon offal."

The Method of the Imposition of the Tax.

The ordinance required an applicant to file a written application with the governing body of the municipality setting forth the location of the place and premises in or at which the business was to be conducted, the area of the ground space thereof, and a diagram of the same; and further required an annual tax or fee for revenue of ¾ of 1 cent per square foot of the ground area of the place in or at which the business was proposed to be carried on (R. p. 10).

There is no proof in the record that the appellants are, in any way, discriminated against in the method of the imposition of the license fee. In the case of *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 57 S. Ct. Rep. 868 at 874, this Court said:

> "In no case do appellees (taxpayers) sustain the burden which rests upon them of showing that there are no differences, between the exempt employers and the industrial employers who are taxed, sufficient to justify differences in taxation."

However, in their brief, the appellants charge that the ordinance is arbitrary in that it provides a license fee measured by the method of ¾ of one cent per square foot of area. Seemingly, appellants consider that some other means of fixing the tax would be better but no contention is made that the rate would not fall equally on all embraced within the terms of the ordinance.

Outdoor storage is commonplace in many lines of business today. Large quantities of goods, which do not require the

protection of buildings, are deposited in the open involving only ground area. This is demonstrated in the present case where the operations of the appellants utilized 56 acres. *Pattison & Bowns, Inc.* v. *Saddle River Twp.*, 129 N. J. L. 135. By employing ground area, the extent thereof being selected by the applicant in making his application, a definite method for the calculation of the fee, fair and honest to both the municipality and the taxpayer, was arrived at which was applicable to both indoor and outdoor commercial warehousing and was superior to a method of measurement by volume, as suggested by the appellants. When it is remembered that the coal in this case was stored in piles 50 to 70 feet high (*Pattison & Bowns, Inc.* v. *Saddle River Township*, 129 N. J. L. 435), each of such piles having a greater volume than an ordinary building, no tax preference was given to indoor storage, in view of the fact that the structure necessary for indoor storage would be an improvement subject to taxation. But, in any event, this Court is not concerned with considerations of this character. In the case of *Carmichael* v. *Southern Coal & Coke Co.*, *supra*, this Court said:

> "Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others. * * * (Citing cases.)

To the same effect is *N. Y. Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573, 58 S. Ct. Rep. 721, wherein the Court said:

> "Reports which must be filed with the Department of public service on the basis of approved systems of accounting suggest an administrative convenience in the

collection and verification of the tax which might properly have been taken into account by the city's Legislature."

Outdoor warehousing is a distinctive business species of the general classification, commercial storage. Even if it were the case, it would be no valid objection that the tax falls heavier on one type of the group than on others. In *Fox v. Standard Oil Co. of N. J.*, 294 U. S. 87, 55 S. Ct. Rep. 333, the Court said:

"A chain, as we have seen, is a distinctive business species, with its own capacities and functions. Broadly speaking, its opportunities and powers become greater with the number of the component links; and, the greater they become, the more far-reaching are the consequences, both social and economic. For that reason the state may tax the large chains more heavily than the small ones, and upon a graduated basis, as indeed we have already held. State Board of Tax Commissioners v. Jackson, supra; Liggett Co. v. Lee, supra. Not only may it do this, but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry." (citing cases).

The appellants cannot complain because their interests might be better off under a different method. In *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 57 S. Ct. Rep. 772, the Court said at page 776:

"We cannot say that classification of chains according to the number of units must be condemned because another method more nicely adjusted to represent the differences in earning power of the individual stores might

have been chosen, for the legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships. It is enough that the classification has reasonable relation to the differences in the practices of small and large chains. The statute bears equally upon all who fall into the same class, and this satisfies the guaranty of equal protection."

In *N. Y. Rapid Transit Corp. v. City of New York*, *supra*, the Court said:

"In taxing utilities as a class, the legislature is not required to make 'meticulous adjustments' for a particular sub-class of utility."

It is appellants' contention that the license fee must be either borne by Erie out of revenues, or paid by the storer of the goods. If the latter course were pursued they say that it would result in a diversion of traffic to competing carriers who, presumably, must be also furnishing free storage to coal shippers contrary to the decision of this Court in *B. & O. R. R. Co. v. 305 U. S.*, 507, 59 S. Ct. Rep. 284, *supra*. In any event, Erie is not entitled to rely on its unlawful agreement to bear the loss on storage, as the basis for attacking the ordinance. As to the argument that it is not feasible to modify the filed tariff rates, which of course need not be done if a direct charge for storage be made on the storer by the warehouse company, this Court in *New York Rapid Transit Corp. v. City of N. Y.*, 303 U. S. 573, 58 S. Ct. Rep. 721 *supra*, had the following to say:

"The disadvantages complained of, as to fare limitations, are applicable only to the corporation, a single member of a class of utilities. It is quite fortuitous that this particular corporation must seek adjustments in fare

in a peculiar way. 'The legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships.' See Great Atlantic & Pac. Tea Co. v. Grosjean, 301 U. S. 412, 424, 57 S. Ct. 772, 776, 81 L. Ed. 1193, 112 A. L. R. 293. 'If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict.' Fox v. Standard Oil Co., 294 U. S. 87, 102, 55 S. Ct. 333, 339, 79 L. Ed. 780."

The appellants further argue that the ordinance is unreasonable and the statement is made that the license fee is fixed without relation to the value of the privilege of conducting the business—a comparison being made to the amount of other license fees of the municipality. The record shows that appellants' business is, by far, the largest in the municipality, which is a residential community of 3,169 inhabitants (Official 1940 Census). It covers a substantial part of a 67½ acre area extending practically the entire breadth of the Township (Ex. P-1, R. 18A); its nature is such, accompanied as it is by the nuisance of dirt, noise, appearance, and added police and fire problems, that it would be barred under the zoning laws of New Jersey in all business or residential areas of any other municipality. If it were a private warehouse it would pay personal property taxes in about the amount of the license fee.

Based on the ground area of 45,000 square feet for each pile of coal (R. 204), with the quantity in each pile being from 20,000 to 25,000 tons (R. 68), the license fee of ¾¢ per square foot would mean a tax of from $.0135 to $.016 per ton. Based on the appellants' estimate of the area of the entire plant at 1,198,500 square feet (Ex. P-2, R. 18), and their estimate of the capacity as 100,000 tons (Ex. D-4, R. 250, 204-208), the license fee would mean a tax of 2¼¢

per ton. A portion of the coal in storage belonged to customers from Passaic and Bogota (R. 163). If the coal had been stored in the yards of such owners in Passaic or Bogota, or in a private yard at Saddle River Township, it would have been subject to a personal property tax at its value of from $4.94 to $9.90 per ton, which at the average Saddle River Township rate of $5.85 per $100.00 (R. 208), would have meant a tax of from 29¢ to 58¢ per ton.

Assuming, without conceding that the appellants may complain in this Court as to the amount of the tax, the best proof that the license fee in this case is not unreasonable is that the personal property taxes (if not in a considerable greater amount than the license fee, at least not in a material lesser amount) were annually paid prior to 1940.

Common knowledge tells us that the personal property taxes were passed along to the buyers of the coal and that the same thing would be done with the license fee. Since the personal property taxes did not injure the business of the yard, the conclusion must likewise be reached that the license fee would not seriously affect the business. The case is to be determined according to general rules and therefore the unusual and manifestly illegal rebate agreement (Ex. P-4, R. 20), whereby Erie assumed the costs of operation, cannot alter this conclusion. *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17, 54 S. Ct. Rep. 267, 269.

The appellants' business was not singled out for the imposition of a license fee for revenue. As compared with the license fee in the present case of ¾¢ per square foot, Saddle River Township has other licensing ordinances to raise revenue and the fees in these run from about 5¢ per square foot of the area used in the business, in the case of carnivals (R. 213), to about 31¼¢ per square foot of area, in the case of saloons (R. 212), which license fees are

in addition to personal property taxes. There also exists a federal tax on coal of 1¢ per ton (R. 169) which is, of course, imposed throughout the entire country without regard to local taxation.

License fees of the character imposed in this case are, contrary to appellants' statement in their brief, a common means of raising revenue for the support of the government in New Jersey. In the case of *Giant Tiger Corp., Camden v. Camden*, 122 N. J. L. 240, the Court held a license fee of $5100.00 a year imposed on a store, was not improper despite the fact that the license fee was in addition to personal property taxes.

The appellants criticize the police regulations in the ordinance. In so doing, they misconceive or misstate the municipal law of New Jersey. In New Jersey the right of a municipality to impose a license fee for revenue is a right which flows from the delegated governmental power to tax and is separate and apart from the police power. This is pointed out in the case of *North Hudson County Railway Co. v. Hoboken*, 41 N. J. L. 71, at Page 81 the Court said:

> "The distinction between the power to license, as a police regulation, and the same power when conferred for revenue purposes, is of the utmost importance. If the power be granted with a view to revenue, the amount of the tax, if not limited by the charter, is left to the discretion and judgment of the municipal authorities."

This is also the general rule, *Gundling v. Chicago*, 177 U. S. 183.

R. S. 40:52-1 and R. S. 40:52-2 conferred on the municipality the power both to regulate the business and to impose a fee for revenue. There has never been any question in New Jersey that both matters may be embraced in the same

ordinance and the Court below, so applied the law to the ordinance in this case. This court follows the construction placed on the State Law by the State Court, *J. Bacon & Sons v. Martin*, 305 U. S. 380, 59 S. Ct. Rep. 257. The cases cited by the appellants in their brief to the effect that the police power cannot be used for raising revenue are cases where a municipality, by its ordinance, availed itself of only its police powers and failed to declare, as was done in the present case, that the fee was imposed for revenue (Ex. S-1, R. 9, 10).

But the contention, in any event, is not pertinent in the present case. The convictions under review (R. p. 6) were for carrying on the storage of personal property in a warehouse engaged in the business of storing goods for hire without the license required by Section 1 of the ordinance —in short, for operating without paying the license fee. No charge was made against the appellants for violating any of the police regulations established by the ordinance and consequently any discussion in regard to the reasonableness of Sections 4, 5, and 6 of the ordinance is purely academic. Furthermore, if any of those sections were unreasonable, they would be expunged by operation of Section 8 of the ordinance which provided that if any part thereof should be illegal or unconstitutional, such invalidity would not impair the remainder of the ordinance (R. p. 11).

The appellants further claim that the municipality is without power to prescribe a regulation prohibiting persons, other than the corporate entity which might be the owner or operator, from using or being employed in unlicensed premises. The appellants propose that the only one who could be penalized in the present case is the operator, the corporate entity Independent Warehouses, Inc., a corporation of New York, which received $500.00 a year for the use of its name for the operation of the plant, and that the

appellant Thompson was deprived of due process and the equal protection of the laws when he, as manager of the plant, was convicted under the ordinance. The argument presumes that the legislature of New Jersey intended ordinances of the character of the one in question in this case to be unenforceable, because unless the foreign corporate entity appeared of its own volition within the municipal jurisdiction, its agents and servants could continue the violation with immunity. The question is one of the construction of the provisions of the law of New Jersey granting authority to the municipality and, as above stated, this court will follow the construction as determined by the State. The Court below, said in regard to the New Jersey law (R. 273):

> "It was within the competency of the local legislative body to render this a punishable offense, essential to the enforcement of the policy of the ordinance; the power is an integral part of the general grant of authority to license and regulate contained in sec. 40:52-1 (g) and 40:52-2, *supra*."

On the question of the equal protection of the law, this Court, in *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 57 S. Ct. 772 said at page 777:

> "In the exercise of its police power, the state may forbid, as inimical to the public welfare, the prosecution of a particular type of business or regulate a business in such manner as to abate evils deemed to arise from its pursuit. Whatever a state may forbid or regulate, it may permit upon condition that a fee be paid in return for the privilege and such a fee may be exacted to discourage the prosecution of the business or to adjust competitive or economic inequalities."

In the case of *Carmichael v. Southern Coal & Coke Co.* 301 U. S. 495, 57 S. Ct. Rep. 868, the Court had the following to say at page 872:

> "Taxes, which are but the means of distributing the burden of the cost of government, are commonly levied on property or its use, but they may likewise be laid on the exercise of personal rights and privileges."

And further at page 878:

> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. See Cincinnati Soap Co. v. United States, *supra*."

III.

The ordinance is not indefinite or uncertain.

(Appellants' Point Relied on 5, R. 283).

Much of the matter discussed in appellants' brief under this point has already been considered under our II.

It is the appellants' contention that the ordinance requires an applicant to speculate on January 1st of each year how much area the volume of business would require during the succeeding year. It should be sufficient to say that the appellants, with their outdoor storage, would be in a far better position than an applicant for a license to do business indoors in a permanent structure, whether it be ware

housing or any other class of business for which a license might be required. The outdoors warehouseman might modify the quantity of area to be utilized from year to year or even increase the same during the year according to his own estimates of his needs and thus pay a fee for only what he actually used; while a licensee in a permanent structure might, in all probability, be paying a fee for a license which he would not fully enjoy. Under the ordinance in question, if there was anything indefinite or uncertain resulting, it could only arise through the indefiniteness or uncertainty contained in an applicant's written application, description of the location, and diagram, which he was required to file and as to which the license would be applicable. The fee would be a mere arithmetical computation based on the area requested by the applicant to be licensed. The Court below in construing the ordinance, said (R. 273):

> "Under the ordinance in the case at hand, the warehouse corporation may protect itself against the inclusion of areas not devoted to storage in the calculation of the tax."

The appellants cannot be heard to complain about the mechanics of the ordinance in relation to the granting of the license. If they had presented an application which had been denied, the law of New Jersey would have afforded them ample and complete relief by review on *certiorari* in case there was any basis to their conjectures of harmful treatment. In the absence of good cause, a municipality of New Jersey may not refuse a license for revenue and therefore, under the ordinance in this case, an applicant would be entitled to receive a license for whatever area he set forth in his application and the diagram accompanying the same. The rule in respect to prohibited indefiniteness is stated in *Gorin* v. *U. S.*, 312, U. S. 19, 61 S. Ct. Rep. 429, 433 as follows:

> "We find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law * * * The language employed appears sufficiently definite to apprise the public of prohibited activities."

The ordinance in this case, in unequivocable language, declared to all the public that any and all persons who thereafter operated a commercial warehouse within the limits of the Township, without a license, would be subject to the penalties therein prescribed. Nothing could be more definite and certain than this.

The appellants object to the use of the term "place or premises". These are the words used in the authorizing statute R. S. 40:52-1 (g). They also object to the use of the words "ground area". All of these words have well accepted, definite meanings (Words and Phrases). In any event, the convictions under review were for operating without a license and the question does not arise in this case whether the appellants or any of them could be convicted, if they ever should be so charged, of having failed to take out a license for all of the premises owned by them, as distinguished from the premises used by them.

The appellants claim that the Township officials "construed" the term "place or premises" to be Block 106-D on the assessment map because that point was, by way of description, alleged in the complaint made by the Chief of Police, as the place where the violation occurred (R-5). In the absence of a demand for more particulars, any or no particular description could have been used in the complaint. The lack of certainty must be found in the ordinance and the complaint would have no bearing. It might be noted, however, that the appellants voluntarily admitted operation at the place charged in the complaint (R-7).

It is further appellants' contention that the ordinance gave to the Township Committee the discretion to determine the area to be licensed. Appellants' Exhibit P-2 (R-18) shows 1,198,300 sq. feet occupied and used in the plant with an additional 462,350 sq. feet in railroad tracks, of which 107,240 sq. feet are classified as storage plant (primary). Had appellants applied for and received a license covering the 1,198,500 sq. feet admitted by them to be used for storage and thereafter there had been a conviction for using railroad tracks or any other part of the unoccupied area for storage, the state courts could have been called upon to construe the meaning of the words "place or premises" and "ground area". But if and when that happened, this Court would not interfere with that construction. *J. Bacon and Son* v. *Martin, supra*.

Appellants complain as to the clause in the ordinance that "the Township Committee may revoke any such license for sufficient cause after notice and hearing." This is verbatim the words of R. S. 40:52-2. Appellants lose sight of the fact that the scope of the present case is a review of the power of the state to tax their business rather than any question as to the power to impose police regulations. The appellants were convicted under the taxing feature of the ordinance and not under the police regulations. On the score of police regulations, the present ordinance must be read in conjunction with other ordinances of the municipality in respect to zoning, building, health, and fire prevention and if, after notice and hearing, it was determined that the continuance of a licensed business would violate the regulations prescribed by any of those ordinances, it would appear that the governing body might properly revoke the license issued under the present ordinance. However, if a licensee felt aggrieved in case such action was taken, he would have full and ample recourse to the state courts to

determine whether the action was proper. Of course, the operation of any police regulation is not in issue in the present case because the appellants were not convicted for anything else other than the failure to take out a license; but if all of the clauses in the ordinance comprising police regulations be expunged therefrom, there still remains the requirement to take out a license and pay the municipality a fee for municipal revenue with a penalty for the failure to do so. The State's right to impose such a tax in such a manner is today unquestionable.

IV.

The ordinance does not impose penalties which deny appellants due process or equal protection of the laws.

(Appellants' Point Relied on 6, R. 288).

The appellants' point is that the ordinance would result in cumulative penalties of such an amount as would prevent them from carrying on their business without securing the required license. Presumably this is what the legislature of New Jersey intended when it enacted R. S. 40:52-2 which prohibited unlicensed places from being carried on, and R. S. 40:49-5 which authorized penalties for the violation of ordinances. Section 7 of the ordinance in question (R-10) is substantially a verbatim statement of the provisions of R. S. 40:49-5 and is the penalty clause used for the enforcement of all ordinances in New Jersey so that in reality appellants' attack is made not only on R. S. 40:49-5, but also on the constitutionality of all penal ordinances in New Jersey.

It is appellants' argument that the rule applicable to penalties imposed in railroad rate legislation should be

applied to licensing ordinances and appellants' brief cites a number of these railroad cases. However, the contention ignores the reason which exists for the rule in the railroad cases. The rule is stated in *Ex Parte Young*, 209 U. S. 123, 147 as follows:

> "Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid."

At common law a common carrier may not refuse to accept goods for shipment, *Missouri Pacific R. R.* v. *Tucker*, 230 U. S. 349, 374, and was required to carry the same at a reasonable rate. Rates may be prescribed as a legislative function, *Louisville & Nashville R. R.* v. *Garrett*, 231 U. S. 298, but the rates, when so prescribed, must furnish some return upon the investment. Consequently, a common car-

rier may not be penalized by a legislative enactment which requires him to carry the goods at a rate which has been fixed without a prior hearing being afforded as to the reasonableness thereof. The reason for the rule arises from the obligation imposed by law on the common carrier to operate. But the situation in respect to a licensee under the ordinance in question is different. In New Jersey, commercial warehouses are not public utilities and may do business with whomsoever and on whatever terms are deemed proper and without any legal guarantee of a profit. In *D. L. & W. R. R. Co.* v. *Central Stockyards and Transit Co.*, 45 N. J. Eq. 50, 46 N. J. Eq. 280, 6 L. R. A. 855, 860 the Court said:

> "There can be no doubt, I think, that a warehouseman is not required, by any general rule of law, to receive goods on storage against his will. In Addison on Contracts, (p. 630), it is said: 'A man cannot be made a depositary without his knowledge and consent; he cannot have the possession of another man's property, with its accompanying duties and responsibilities, forced upon him against his will.' This must be so from the very nature of such transactions, for all bailments not made by force of statutory regulation rest in contract, and no contract can exist without consent, express or implied."

On account of the duty imposed on the common carrier which results in the right to a reasonable return, the legality of operating orders against the carrier is not apparent on the face of such orders but depends upon a showing of extrinsic facts, *Wadley &c So. Ry.* v. *Georgia*, 235 U. S. 651; but in the present case, the warehouseman is merely prohibited from doing business unless he files an application and receives a license. Under the state law, before

the passage of the ordinance; and after public notice, a hearing is afforded all persons interested, R. S. 40:49-2b. After its passage, any person deeming himself affected thereby may review the legality thereof in the state courts. *Percello* v. *Ocean Grove*, 100 N. J. L. 407; *Ross* v. *Mayor etc. Edgewater*, 115 N. J. L. 477; 299 U. S. 543; 57 S. Ct. Rep. 37. In the present case, the appellants refused or failed to make application for a license, but admittedly continued operating without regard to the ordinance and without having made any attack on it except to file a protest (Ex. P-16, R. 59). Even under the common carrier rule, in *Wadley & So. Railway* v. *Georgia*, 235 U. S. 651, 669 (one of the cases cited by appellants) the Court said:

> "But where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate and available remedy by which it could test in the courts its validity and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful."

There can be no more basis to appellants' contention than an argument that the Federal Price Control Act and Income Tax Law are unconstitutional because they impose heavy penalties for the failure to file the returns required thereunder prior to matters contained in such returns being litigated. If, upon the filing of the application required under the present ordinance, the appellants felt themselves aggrieved in any respect by the action of the municipal governing body in connection therewith, they were fully protected under the law of New Jersey in the state courts by their right to a review. To avoid the danger of the imposition of a penalty for the failure to pay the required license

fee, they could have; (a) discontinued further business in Saddle River Township until the matter was determined, or (b) paid the license fee under protest and recovered it back in the event they were successful in maintaining their position, pursuant to the rule in *Ocean Grove Association* v. *Bradley Beach*, 91 N. J. L. 364, *Mayor etc. of Jersey City ads. Riker*, 38 N. J. L. 225; *Jersey City* v. *O'Callaghan*, 41 N. J. L. 349, and *Cox* v. *Tax Collector*, 79 U. S. 204.

The ordinance in the present case presents the simple question of a penal enactment. It was the mandate of the state, acting in this case through the municipality, that any and all commercial warehouses, before doing business in the Township, should file an application and secure a license for the area which they selected in which to do business. To compel obedience to this mandate the state might impose such penalties as it deemed necessary. Although this court will not inquire into the policy underlying the enactment, it goes without saying that without cumulative penalties a license ordinance of this character would be unenforceable because otherwise, on the payment of a single penalty of $200.00, immunity from further prosecution in the future would be obtained. However, as pointed out by the Court below, under the convictions under review in this case, the question of cumulative penalties does not arise. If the clause, Section 7 of the ordinance (R-11) that "each day shall constitute a separate offense" is legally objectionable, it is expunged by Section 8 which provided that in the event any part of the ordinance should be illegal, the same would not impair the remainder. Even under the common carrier cases, it was held that penalties which deny due process of law will not render a rate statute unconstitutional if they are separable. *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 311.

All of appellants' contentions in respect to due process and equal protection of the laws are necessarily without basis for the reason, that the principle is well established, that, when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration. *Gundling* v. *Chicago*, 177 U. S. 183, 186, 20 S. Ct. 633, 44 L. Ed. 725; *Lehon* v. *Atlanta*, 242 U. S. 53, 55, 56, 37 S. Ct. 70, 61 L. Ed. 145; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 553, 554, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917 F, 514, Ann. Cas. 1917C, 643.

V.

The New Jersey Court of Errors and Appeals did not err in affirming the judgments of conviction of appellants.

Appellants make this point in their brief but the same is not set out in their statement of points to be relied upon (R. 287).

As similarly done by the appellants, the appellees rely upon the facts, arguments and authorities above set forth under Points I to IV inclusive of this brief.

CONCLUSION.

For the reasons above set forth, appellees pray that the judgments of the New Jersey Court of Errors and Appeals here under review in the above entitled causes be affirmed.

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p. 5.

SUPREME COURT OF THE UNITED STATES

No. 83.—October Term, 1946.

Independent Warehouses, Inc., Pennsylvania Coal Company, Erie Railroad Company and James Thompson, Appellants,

v.

William Scheele, Recorder of the Township of Saddle River, and the Township of Saddle River.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

[April 14, 1947.]

Mr. Justice Rutledge delivered the opinion of the Court.

An ordinance of Saddle River Township, New Jersey, forbids carrying on the business of storing goods for hire except upon the payment of an annual license tax.[1] Independent Warehouses, Inc., and Thompson, an agent of that company, have been convicted and fined for conducting such a business without procuring the license or paying the tax. The convictions have been sustained by New Jersey's highest court.[2] The appeal here seeks to have that judgment reversed on the basis that the business done was exclusively interstate and consequently the application made of the ordinance contravenes the commerce clause of the Federal Constitution, Art. I, § 8. Fourteenth Amendment objections also are raised.[3]

The main thrust of the argument has been toward the commerce clause phase of the case. In this the contro-

[1] The material terms of the ordinance appear at note 9 *infra* and text.

[2] See text Part I *infra*. A prior suit in a federal district court to enjoin enforcement was dismissed because of the existence of a "plain, speedy and efficient remedy" in the state courts. *Independent Warehouses* v. *Saddle River Township*, 52 F. Supp. 96; 28 U. S. C. § 41 (1).

[3] Those objections are discussed in Part III of this opinion.

versy is of the familiar "interruption" or "cessation" type. The issue accordingly requires only a determination of the proper application to be made of well-established legal principles to the particular circumstances. It is whether the cessation taking place in the movement of goods interstate, as shown by the record, is of a nature which permits the state or a municipality to tax the goods or services, here the business of storing them, rendered in connection with their handling.[4]

The governing principles were stated in *Minnesota* v. *Blasius*, 290 U. S. 1, 9–10, as follows:

> ". . . the States may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to a rest within a State and become subject to the power of the State to impose a nondiscriminatory property tax.[5] Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may act until Congress, if it has paramount authority over the subject, substitutes its own regulations. The 'crucial question,' in determining whether the State's taxing power may thus be exerted, is that of 'continuity of transit.' *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, 101.
>
> "If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it. . . . If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and

[4] "A non-discriminatory tax upon the business of storing" goods which are not yet in interstate commerce is not forbidden. *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 21.

[5] See note 4.

convenience in the course of the movement. . . . Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. . . .

"Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power."

Since the circumstances characterizing the interruption are of controlling importance, we turn to the details of the movement and of the stoppage shown by the record.

I.

The suit is the culmination of a controversy extending back to 1939, with earlier litigious chapters in the state and federal courts. It grows out of the operation of facilities for storing and handling coal under various arrangements between the Erie Railroad Company and other corporations affiliated for this and other enterprises by stock ownership or by contract.

The Pennsylvania Coal Company is a wholly owned subsidiary of Erie. It owns and operates coal mines in Pennsylvania. In 1901 it acquired 67.25 acres of land in Saddle River Township, New Jersey. This acreage and its facilities, known as Coalberg, are located on the New York, Susquehanna and Western Railroad and perform functions connected with that road's operations not material to this cause. Coalberg also is connected di-

rectly with the Bergen County Railroad, a freight cutoff of Erie. Its chief purpose, and the only one relevant to this controversy, is to provide storage for coal shipped in from the Coal Company's Pennsylvania mines and later shipped out to various destinations.

Prior to 1939, Coalberg was operated by the Coal Company or its lessees as a private business, not as a public utility. During this time the Township levied personal property taxes upon the coal in storage, assessing and collecting them from its owners.[6] These were, as they are now, chiefly coal distributors using Coalberg's storage facilities, principally because of their accessibility to distributing centers, especially in the vicinity of New York City, and to shipping facilities both by rail and by water.[7]

In 1939, however, by arrangements to be set forth involving Erie, the Coal Company and Independent Warehouses, Coalberg was converted into a public utility to serve shippers of coal on Erie lines. Under New Jersey law, goods stored in warehouses conducted for hire are exempted from personal property taxes. Rev. Stat. N. J. § 54:43.20. The Township, despite the change in Coalberg's mode of operation, continued to levy such taxes on the stored coal until the 1940 assessment was invalidated in the state courts. *Pattison & Bowns* v. *Saddle River Township*, 129 N. J. L. 135; 130 N. J. L. 177.

The municipality's resulting loss in revenue amounted to about eight per cent of the total collected for local, county and state purposes. To make up for this, as its

[6] In 1921 the New Jersey Supreme Court sustained the imposition of these taxes against attack on various grounds. *Pennsylvania Coal Co.* v. *Saddle River*, 96 N. J. L. 40.

[7] Coalberg is located conveniently to tidewater ports, as well as rail facilities for distribution in northern New Jersey and elsewhere. The distributors using Coalberg's facilities forward their coal not only to the near-by metropolitan area of New York City and northern New Jersey, but also to the New England States.

brief here candidly admits, the Township enacted the ordinance now in question, acting under other provisions of state law. N. J. Stat. Ann. §§ 40:52–1, 40:52–2. The effect was to shift the direct incidence of taxation from the owners of the coal, *i. e.*, the shipper-distributors, to the operator of the storage business and to change its character from a direct property tax to that of a license or franchise tax for the privilege of conducting that business in the state. The amount of revenue thus produced, though in dispute, substantially will repair the loss suffered from invalidation of the property tax. This suit is the outgrowth of the Township's effort to enforce the new taxing provisions.

It is necessary to state in some detail the arrangements made in 1939 by which the change was brought about in the mode of operating Coalberg. An agreement then made between the Coal Company and Erie provides that the former shall operate Coalberg "as a public service facility for shippers of prepared anthracite coal on Erie lines desiring storage space in accordance with and under the rates named in a certain Tariff on file with the Interstate Commerce Commission and the Public Utilities Commission of the State of New Jersey. . . ." The agreement recites that it is made in view of the considerations that the Coal Company has no need for Coalberg's storage facilities and that they are of use to Erie in affording "facilities for the storage of prepared anthracite coal for shippers on Erie lines whereon said Coalberg Storage Yard is located so that shipments of coal may not be diverted to other and competing lines on which facilities for coal storage are available. . . ." Erie pays the net monthly loss, if any, of operating the yard and the Coal Company remits to Erie the net monthly surplus, if any. Erie also undertakes to maintain an agent at Coalberg duly authorized on its behalf to issue warehouse receipts for coal placed in storage by shippers.

The Coal Company has discharged the operating function under its agreement with Erie by an arrangement also made in 1939 with Independent Warehouses, which is a New York corporation engaged in the warehousing business. The Coal Company leased Coalberg to Independent Warehouses for $1.00 a year and the latter undertook to operate the plant for a consideration which now amounts to approximately $500 a year. The agreement between the Coal Company and Erie governs the manner of Coalberg's operation by Independent Warehouses.

Under these arrangements purchasers from the Coal Company who ship coal from the mines designate the destination on the shipping papers. If they designate Coalberg, the coal is sent there on railroad cars. It is unloaded to the storage pile where it is kept until ordered out by the owner. It is then reloaded into railroad cars, and when it is reshipped there is a new billing to the new destination. Most of the coal, after it has been stored, goes to states other than New Jersey. Some, however, is marketed in New Jersey. It is disputed whether there is any local distribution in the Township, but if so the amount is comparatively insignificant.

The financial arrangements under the governing tariff are as follows. On arrival of the shipments at Coalberg the transportation charges on the movement from the mine to Coalberg are paid to the Erie freight agent at Coalberg. When the coal is moved again after storage, the remainder of the through tariff rate from the point of original shipment at the mine in Pennsylvania is paid. This arrangement is known as the transit privilege. "The privilege of transit enables grain [here coal] to be shipped from point A to point B, there to be stored, marketed, or processed, and later reshipped to point C at a rate less than the combination of the separate rates from A to B and B to C." *Board of Trade* v. *United States*, 314 U. S. 534, 537–538, and authorities cited.

The storage facilities given to shippers are free for a period of two years,[8] although a charge is made by Erie for unloading the cars into the stock pile and for reloading the cars for reshipment. A charge is also made by Independent Warehouses upon such coal owners as obtain warehouse receipts from it.

The licensing ordinance applied in this case was adopted in 1943, following upon the New Jersey decision in *Pattison & Bowns v. Saddle River Township, supra*. The ordinance provides:

> "No person, firm or corporation shall conduct or carry on the business of the storage of personal property in a warehouse engaged in storing goods for hire or work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises in which is conducted or carried on the storage of personal property in a warehouse engaged in the business of storing goods for hire, unless and until there shall be granted by the Township Committee of the Township of Saddle River in accordance with the terms of this ordinance, and shall be in force and effect, a license to conduct said business for the place and premises in or at which said business shall be conducted and carried on."

The ordinance specifies that for the license there shall be charged and collected in advance an annual fee of three-quarters of a cent for each square foot of ground in the

[8] The tariff provides: "The period of time allowed for the storage privilege and protection of the through rate from point of origin to ultimate destination shall be two (2) years from the date of delivery at storage point, as shown on the inbound freight (expense) bill. The Erie Railroad reserves the right to require owners to remove their coal at the expiration of the two years period. Any coal which is not reshipped within two (2) years will lose the privilege of being reshipped at the through rates from point of origin to destinations beyond the storage yard. . . ."

Township where the business is carried on. There is also a penalty clause,[9] in addition to other provisions not now pertinent.

Independent Warehouses did not apply for the license or pay the tax for 1943. Consequently that company and Thompson were convicted in the Magistrate's Court before appellee Scheele, the Recorder of the Township, for having violated the ordinance by conducting the storage operations at Coalberg without complying with its requirements. Each was fined $200.[10] The Coal Company and Erie were allowed to intervene when the case went before the New Jersey Supreme Court, because of their obvious interest in the outcome of the litigation. That court held the ordinance unconstitutional as an undue burden on interstate commerce and reversed the convictions. 132 N. J. L. 390. In turn the New Jersey Court of Errors and Appeals reversed the Supreme Court's determination. 134 N. J. L. 133. It held that the ordinance was valid under the provisions of state law, and that neither the commerce clause nor the Fourteenth Amendment guaranties relied upon had been infringed. The case comes here on appeal, 329 U. S. —, pursuant to § 237 (a) of the Judicial Code. See *King Mfg. Co. v. Augusta*, 277 U. S. 100; *Jamison v. Texas*, 318 U. S. 413, 414.

[9] "Any person, firm or corporation who shall violate any term or provision of this ordinance shall upon conviction thereof be subject to imprisonment in the County Jail or in any place provided by the Township of Saddle River for the detention of prisoners, for a term not exceeding ninety (90) days or to a fine not exceeding Two Hundred Dollars ($200.00) or both. Any person so convicted may, in the discretion of the Magistrate by whom he was convicted, in default of the payment of any fine be imprisoned in the County Jail or place of detention provided by the Township of Saddle River, for any term not exceeding ninety (90) days. . . . Each day that a violation of any of the terms or provisions of this ordinance shall continue shall constitute a separate offense."

[10] Thompson was to be imprisoned for 90 days in the event of default in payment of his fine.

II.

That the storage of the coal is part of a transit privilege does not in itself sustain appellants' claim that the interstate movement had not stopped sufficiently for the state's taxing power to attach when the coal reached and was stored in Coalberg. Cf. *Minnesota* v. *Blasius, supra; Bacon* v. *Illinois*, 227 U. S. 504. It has long been recognized that transit privileges rest "upon the fiction that the incoming and outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination." *Central Railroad Co. v. United States*, 257 U. S. 247, 257. See also *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 279 U. S. 768, 779–780. Of course this fiction, which may be desirable for ratemaking or other purposes, cannot control the power of a state or municipality to tax activities properly subject to exercise of that power apart from the fiction's application to them.

Indeed, the facts of this case demonstrate that here at least the fiction is complete. They show that the journey of the coal from the Pennsylvania mines to Coalberg and the subsequent journeys upon leaving Coalberg were not parts of a "continuity of transit" in the sense held by this Court's previous decisions to preclude a valid exercise of the states' taxing or regulatory powers. See, *e. g., Pittsburg & Southern Coal Co.* v. *Bates*, 156 U. S. 577; *General Oil Co.* v. *Crain*, 209 U. S. 211; *Bacon* v. *Illinois, supra; Susquehanna Coal Co.* v. *South Amboy*, 228 U. S. 665.

A characteristic feature of those cases in which the state has been allowed to tax property which has come to rest after an interstate journey is that at the time the tax is laid it cannot be determined what the ultimate destination or use of the property may be. Thus in *General Oil Co.* v. *Crain, supra*, the oil was shipped to Memphis and held there until required to supply orders from out-of-state customers. In *Brown* v. *Houston*, 114 U. S. 622,

coal sent from Pennsylvania to New Orleans was held taxable in Louisiana because, although some of it was subsequently exported, it "was being held for sale to anyone who might wish to buy." *Champlain Co.* v. *Brattleboro*, 260 U. S. 366, 376. In *Bacon* v. *Illinois, supra*, the grain sent to Bacon's elevator was at his complete disposal. "He might sell the grain in Illinois or forward it as he saw fit." Although his intention was to forward it after inspection, grading, etc., this purpose was held irrelevant. 227 U. S. at 516. And in *Susquehanna Coal Co.* v. *South Amboy, supra*, although there was an anticipation of orders for the coal unloaded at South Amboy, yet there were no actual orders from customers. See also *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249; *Edelman* v. *Boeing Air Transport*, 289 U. S. 249.

Those cases are indistinguishable from this one as to the facts and the effect of the stoppage. Once the coal has reached Coalberg, no one can determine, without receiving an order from the owner, to what point or person it finally will be sent or to what use it will be put. Indeed, at the actual time of storage, even the owner may not know where the coal will go next, for the very purpose of the storage is in part to meet seasonal demand.[11] And while the form of billing is not conclusive, *Minnesota* v. *Blasius, supra*, the fact that the coal is billed to Coalberg and is not rebilled until the owner asks that it be released

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[11] It is to be noted however that the two-year period allowed by the tariff for storage, see note 8, is longer than is necessary to allow for meeting seasonal demand.

Storage-in-transit privileges are supplied, it is said, "as a result of traffic demands." A witness gave the following illustrations:

"(a) Coal is a commodity of seasonal consumption. Most of it is consumed in cold weather. If the mines could produce currently sufficient coal to meet cold weather requirements, the railroads would be swamped with coal traffic during the fall and winter months when other seasonal products are moving in large volume and weather conditions retard transportation operations. By spreading coal ship-

from storage further shows that the final destination is not known by the owner or by others.

Moreover, in all these cases the duration of the cessation of transit is indefinite and in this case may extend as long as two years without loss of transit privilege. Indeed, except for that loss it may extend indefinitely, since under the controlling tariff, Erie does not require, but only reserves the right to require, removal at the end of two years.[12] It is also significant that invariably the goods are fungibles, a fact pointing up the fictional basis of the in-transit privilege. The goods which are sent initially into the interstate commerce stream are not the identical goods which finally arrive at the place of consumption.

In view of all these considerations, the case falls more appropriately in the category allowing the state's taxing power to apply, than in the one denying its applicability.

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ments for winter use over the months of most favorable operating conditions, a more uniform transportation revenue is assured.

"(b) Coal dealers and consumers ship it more uniformly throughout the year by using storage-in-transit privileges under railroad tariffs, and use negotiable warehouse receipts to finance their purchases where necessary.

"(c) The movement during warm weather of the bulk of the winter coal supply avoids car storage and releases cars more rapidly than if they arrived frozen solid, as they often do in winter, where delayed by bad weather or had to wait unloading and use at the place of consumption.

"(d) Experience has shown many instances, like those of recent occurrence, when a supply of stored coal close to the market areas has been necessary to prevent or relieve acute shortages of fuel in cases of labor, weather, or other interruptions in production or transportation.

"(e) A uniform movement of coal during favorable operating conditions, avoids the congestion, delay and increased expense which otherwise attends rush and emergency transportation in winter weather.

"(f) Such storage-in-transit facilitates a more uniform and steady employment, not only of the miners but also of railroad employees, as well as a more uniform and steady railroad revenue."

[12] See note 8.

The interruption hardly can be held to be "due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement," *Minnesota* v. *Blasius*, 290 U. S. at 9–10, broad as may be the latitude given for such incidents of transit. More is involved here than stopping to take advantage of such latitudes. The case therefore is one, again in the language of the *Blasius* case, "where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates. . . ." 290 U. S. at 10.

The facts bring the case exactly within this description, although the record shows that most of the coal after storage goes to other states and little, if any, is distributed locally at Coalberg. Not what ultimately happens to the goods or where they finally go, but the occasion and purpose of the interruption are controlling. "The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied." *Minnesota* v. *Blasius*, 290 U. S. at 10.

Here the cessation takes place not simply for the carrier's transit reasons relating to the necessities or convenience of the journey, but for reasons primarily concerned with the owner's business interests. As in the *Bacon* and *Susquehanna Coal* cases, *supra*, he is entirely free to keep or market the goods in New Jersey or to send them elsewhere. Marketing considerations primarily, and it may be exclusively, determine this choice and many or all of the controlling factors may not arise until after the coal has reached Coalberg or indeed many months later.

The situation in this respect is not materially different from those involved in the *Susquehanna Coal*, *Bacon*, and other cases cited, or indeed from one in which a coal

distributor might place his storage facilities at some distance from his place of market, as at a near-by way station, in order to reduce the cost of his storage operations. That reasons of economy and convenience or even of necessity arising from the absence or prohibitive cost of storage space at the immediate point of distribution might lead him thus to locate his storage operations, and thereby incur the necessity and expense of hauling the goods from storage to market, hardly could be held to make the interruption an incident of transit rather than one of his own business policy and interest. That he may secure the same advantages by using the storage facilities of others for like purposes, rather than his own, does not change the result. In neither case does the arrangement defeat the state's power to tax his property so located or his business thus conducted.

Moreover, as has been noted, some of the coal remains in New Jersey, being shipped out from Coalberg as the shipper directs. As to this all interstate transportation has ended. The fact that the owner elects to take advantage of Coalberg's storage facilities for conducting his storage operations rather than his own located at the point or points of final distribution in New Jersey, whether near to Coalberg or at some distance, does not make the final wholly intrastate movement between those points a leg of the initial interstate movement begun at the mine.

As for the coal moving out of Coalberg interstate, the fact that this movement crosses a state line makes it of course an interstate movement. But this does not make it part of a continuous journey beginning at the mine and ending in the second state of destination. Indeed, not until after the storage has taken place is it determined or can it be known whether this coal will move out of Coalberg interstate or intrastate. And this is because it cannot be known before that time whether the owner's interest, disconnected from the ordinary and usual incidents of transportation, will dictate one market or use rather than

another. Interruptions thus governed cannot be classified as interruptions merely incident to transit or dictated by its necessities or convenience.

The 1939 change in Coalberg's mode of operation did not alter in any substantial way the character, duration or purpose of the stoppage. Since then as before, the primary reasons dictating the shippers' action in taking advantage of it are their business reasons rather than transit reasons as such. Accordingly the state's power to tax the goods stored could not be affected by that change. That the state has chosen to discontinue exercising it as a matter of state taxing policy can make no difference in this respect. Nor can this fact, or the change in method of operation, defeat the state's power to tax the business of furnishing the facilities for storage, since that business also becomes local or interstate depending upon the purposes of the stoppage, whether for transit reasons or chiefly for nontransit ones.

The authorities above cited, it is true, generally involved property taxes levied upon the stored coal. But their controlling principle applies equally to franchise or other taxes upon the business of furnishing the storage facilities. Cf. *General Oil Co.* v. *Crain*, 209 U. S. 211; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500. It would be an impermissible anomaly to hold that the goods stored may be taxed, because the interruption of transit is for nontransit purposes, but that the business of furnishing the facilities for storing them is not affected or governed legally by the same purposes, for applying the state's powers of taxation.

Accordingly, the case is governed by the prior decisions allowing states and municipalities to tax in situations of this sort. It follows that the tax is not forbidden because it is part of a licensing measure. Even where it is undisputed that the commerce is exclusively interstate in nature, "not the mere fact or form of licensing, but what the

license stands for by way of regulation is important." *Robertson* v. *California*, 328 U. S. 440, 458. See also *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202; *Federal Compress Co.* v. *McLean*, 291 U S. 17. Nor does anything in the Interstate Commerce Act forbid local taxation where it is otherwise permissible. The tax therefore is valid under the commerce clause.

III.

Whether the tax and the licensing measure as applied may stand under the Fourteenth Amendment also must be considered. Appellants say that the ordinance is discriminatory and unreasonable. Discrimination is claimed because the ordinance is applicable only to commercial warehouses and not to private warehouses and because there are no other commercial warehousing facilities in the Township subject to the tax. This contention is grounded on the provisions of New Jersey law, noted above, exempting property stored in commercial warehouses from taxation. It also is closely related to the further claim that the tax is prohibitory and unreasonable, and the two claims may be considered together.

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. . . . This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 509.

We need not consider in this connection the ultimate power of the state to tax,[13] for we are of opinion that

[13] See the dissenting opinion of Mr. Justice Brandeis in *Liggett Co.* v. *Lee*, 288 U. S. at 570 ff.

neither the selection made here nor the amount of the tax is barred by the Fourteenth Amendment.

The New Jersey Court of Errors and Appeals has held that the present tax is not an illegal evasion of the state laws exempting personal property in commercial warehouses from property taxes, and that the municipality was empowered by state law to levy this tax. Those rulings are conclusive upon us. Nor is it material to any question we have to decide that the practical result of the valid taxing power given the municipality enabled it to make up the loss in revenue suffered when Coalberg was transformed to a public facility.

Constitutionally speaking, the tax is not invalid as being unreasonably large for the privilege conferred.[14] It is not shown that the exaction is unrelated to the value of the privilege conferred and the Court of Errors and Appeals found to the contrary.[15] Private contractual arrangements, such as have been made here,[16] cannot be effective to defeat the state's power to impose such a tax, with the practical effect of relieving the real beneficiaries of the privilege from all taxation by virtue of their success in shunting its burden contractually to the nominal oper-

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[14] The tax, however, may be somewhat larger than the aggregate of the former personal property taxes. Personal property taxes paid prior to 1939 amounted to about $12,000 a year. Estimates of this tax given in the record vary from about that sum to around $20,000 a year. The variation corresponds to different estimates of the area, in terms of footage, constituting the base for calculation of the tax.

[15] See note 14. Cf. the dissenting opinion of Mr. Justice Brandeis in *Liggett Co. v. Lee*, 288 U. S. at 573, "The Federal Constitution does not require that taxes . . . be proportionate to the differences in benefits received by the taxpayers. . . . or that taxes be proportionate to the taxpayer's ability to bear the burden."

[16] The record discloses that the present agreements between Independent Warehouses and the coal company are from year to year until terminated upon notice.

ator.[17] And the suggestion that the tax under the ordinance is prohibitive can carry no weight in view of the fact that substantially equal personal property taxes were paid prior to 1939.[18]

Appellants' other arguments may be given shorter disposition. The contention that Thompson's conviction is "unlawful" is answered by the decision of the New Jersey Court of Errors and Appeals which held that the municipality possesses the power which it exercised to convict persons working in unlicensed warehousing premises as well as to prohibit corporations and others from carrying on the business of warehousing without obtaining a license. Thompson was convicted not for his employer's act but for his own.

It is suggested also that the ordinance gives to the municipality an uncontrolled discretion to revoke the license and is therefore invalid for uncertainty, since it permits the Township Committee to "revoke any such license for sufficient cause after notice and hearing." Appellants have made no attempt to secure a license and therefore are not in position to attack the revocation provisions of the ordinance. Cf. *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183, 188, and authorities cited.

Finally the ordinance is said to be invalid because of the provision for cumulative penalties.[19] The penal provisions however have not been imposed cumulatively in this case. Moreover the New Jersey Court has held them

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[17] Cf. *Browning* v. *Waycross*, 233 U. S. 16, 23; *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 22: "It is not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause."

[18] See note 14.

[19] The ordinance makes each day's continuance of violation a separate offense.

separable,[20] if illegal. In such circumstances, the objection that the mere unapplied provision for cumulation violates the Fourteenth Amendment is without substance. *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298, 311, and authorities cited.

The judgment is

Affirmed.

[20] The New Jersey Court of Errors and Appeals stated: "The ordinance contains a provision that in case 'any action or part' thereof shall be held illegal or unconstitutional, such invalidity 'shall not be construed as impairing the force and effect of the remainder of the ordinance.' If it be conceded *arguendo*, that the cumulative penalty clause is invalid in whole or in part, the remainder of the provision for sanctions is severable and would stand unaffected."

SUPREME COURT OF THE UNITED STATES

No. 83.—October Term, 1946.

Independent Warehouses, Inc., Pennsylvania Coal Company, Erie Railroad Company and James Thompson, Appellants, *v.* William Scheele, Recorder of the Township of Saddle River, and the Township of Saddle River.	Appeal from the Court of Errors and Appeals of the State of New Jersey.

[April 14, 1947.]

Mr. Justice Frankfurter, concurring.

The dissenting views lead me to add a few words to the Court's opinion, in which I join.

Nearly thirty-five years ago Mr. Justice Holmes observed that "one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end." (Holmes, Speeches, Law and the Court, 98, 102). His concern has not lost force with time, and it is important to be duly mindful of it whenever a State claims the power to tax in a situation like that now before us.

Equally relevant are other observations by Mr. Justice Holmes regarding this problem. "It being once admitted, as of course it must be, that not every law that affects commerce among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines." *Galveston, Harrisburg, etc. R. Co.* v. *Texas*, 210 U. S. 217, 225.

And so, this Court has sustained a tax upon the mining of ore although substantially all the ore left the State and was put upon cars for that purpose by the same act by which it was produced. *Oliver Iron Co.* v. *Lord*, 262 U. S. 172. Mr. Justice Holmes joined in that opinion although "There could not be a case of a State's product more certainly destined to interstate commerce." Holmes, J., dissenting in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 600, 601. Again, the Court has held that a State may impose a non-discriminatory tax on goods which, although connected "as a general course of business" with "a flow of interstate commerce," "has come to rest and has acquired a situs within the State" at "a depot . . . for another interstate journey." *Minnesota* v. *Blasius*, 290 U. S. 1, 8, 11. For the practical purposes which determine the constitutional issue there can be no difference between taxing such goods as property and taxing the business of being a depot for such goods. In striking the constitutional balance between State and national powers, figures of speech are treacherous. The ore which Minnesota was allowed to tax in the *Lord* case, and the cattle which Minnesota was allowed to tax in the *Blasius* case, were in no practical sense less in the "flow of commerce" than the coal the storage of which was the business subjected to a non-discriminatory license tax by New Jersey.

Nor can it make a difference that this storage business was conducted by a concern controlled by the coal-carrying road. If a wholly independent storage concern would have had to pay a license tax, the controlling constitutional principles require no different result because the storage facility is a subsidiary of a railroad. Presumably there are good business reasons for the use of such a subsidiary corporation. Compare *Edwards* v. *Chile Copper Co.*, 270 U. S. 452, 456. Those reasons are equally valid for the State's taxing purposes. It cannot be said that

New Jersey has given no opportunities, has afforded no protection, and has conferred no benefits upon Independent Warehouses, Inc., merely because in an ultimate sense there is a financial identification between Independent Warehouses and the Erie Railroad. Compare *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444. If what was here involved were merely an occasional and transient storage of coal moving from Pennsylvania to New York, New Jersey could not levy a property tax on the coal nor a license tax for the storing of it. The controlling consideration here is that there was storage of the coal precisely like the holding of the cattle in the *Blasius* case. In both cases there was a sufficiently distinct and permanent break in the process of transportation between the States so as to give rise to interests in the State of storage to justify the exertion of its non-discriminatory taxing power. For me this case is controlled by *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665. Here, as in that case, there was something more "than an incidental interruption of the continuity" of the coal's "journey through the State." There was "a business purpose and advantage in the delay which was availed of, and while it was availed of, the products secured the protection of the State." 228 U. S. at 668 and 669. Thereby the State's power to tax arose.

The fact that for railroad-rate purposes this storage was treated as part of a transit privilege does not affect the relation of the storage to the taxing powers of the State. Assuming that such a storage may properly be treated as a stop-over privilege under the Interstate Commerce Act, it does not follow that the break in the process of interstate transportation is not of such significance in its relation to a State as to allow that State to tax the protection given to the property during the break as well as the opportunity afforded in conducting the business for such separable and enduring storage in the State.

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[April 14, 1947.]

Mr. Justice Jackson, with whom Mr. Chief Justice Vinson joins, dissenting.

The Erie Railroad Company is a common carrier engaged in interstate commerce. By a specific tariff filed with the Interstate Commerce Commission pursuant to the Interstate Commerce Act it and several other rail carriers have long published a joint and proportional through-tariff on anthracite coal from coal mining stations in Pennsylvania to points in New York and New Jersey. The tariff provides for storage-in-transit services at Coalberg, New Jersey, with reshipment to destination under original agreements. Independent Warehouses, Inc., as contract agent for the Erie, operates these storage-in-transit facilities, has custody of the coal in storage under Erie tariffs as a public warehouseman, and issues warehouse receipts for coal received under railroad waybills. Title to Coalberg is in the Pennsylvania Coal Co., a wholly-owned subsidiary of Erie, and it receives from Independent Warehouses one dollar per year for its lease. The Erie ultimately bears all losses and gets all gains. It is apparent that Coalberg is a facility for storage in transit of coal operated as part of the Erie's interstate transportation service.

The function of the storage in transit is vital. During the summer season, consumption of anthracite coal is light and neither dealers nor consumers in the City of New York and elsewhere are able to store adequate winter reserves. At critical times there would be grave danger of inadequate fuel supplies from interruptions of transportation or of mining operations if stock piles were not accumulated near consuming centers, such as New York, to be drawn upon in periods of peak demand. Therefore, the railroad accepts coal shipments which it mingles in stock piles at Coalberg, near New York, with the privilege to the shipper of ordering the same grade and quantity sent on to destination as needed. When orders for reshipment come, they are drawn from stock piles and delivered. Storage-in-transit is a device to equalize the demands on coal transportation facilities and to provide a reserve supply of coal for periods when consumption exceeds production, to enable movement away from the mines during the period when production exceeds consumption, and to finance future purchases by warehouse receipts issued against coal in transit. It is an essential part of dependable and low-cost transportation of anthracite coal from the mines to the great metropolitan consuming area.

For the privilege of operating this storage-in-transit facility at Coalberg in New Jersey, the municipality demands an annual license fee, in advance, which it is alleged would amount to $20,475. This is merely for the privilege of doing the business. The property used in the operation is also subject to the usual property tax on a valuation of $133,875, which is not in question.

The issue is whether this local privilege tax unconstitutionally burdens interstate commerce. The burden and its substantiality are undeniable, but the Court concludes that these local assessments upon interstate traffic are within the power of the state and, of course, the amount, be it $20,000 per year or $20,000,000 per year, is wholly

for the local authorities to determine if their power to tax is upheld.

I cannot agree that the commerce clause of the Federal Constitution has left interstate traffic vulnerable to such local permissions and burdens. Because the immediate impact of the tax is on a railroad, we should not delude ourselves as to its real effect. It is a tax on traffic—on the movement of goods—and its weight is shifted from the carrier to the consumer. There is, of course, a "local incident," a stoppage in transit, a reloading. "Local incidents" of some sort can be identified in all interstate transportation. But in this case local sales or deliveries are insubstantial in amount. The whole operation is incidental to interstate transportation and not to any local business. It is integrated in operation, ownership and management with transportation. It is under the federal comerce power and under Interstate Commerce Commission regulation. The stoppage may be longer than many other stoppages in transit incident to railroading. But the storage of perpetually renewed and continuously drawn-upon stock piles is no longer than necessary to adapt transportation facilities to the needs of an economy, one end of which must engage in continuous production and the other in only seasonal consumption. That a single municipality or state can fasten local tax burdens upon such an incident makes interstate commerce vulnerable to the very barriers and obstructions the commerce clause of the Constitution was designed to end.

The unedifying story of Colonial rivalry in preying upon commerce, which more than any one thing made our Federal Constitution a necessity, is too often told by historians to justify repetition. This tax is reminiscent, however, of some phases of that commercial warfare. In 1787 New York was being supplied with firewood from Connecticut and much farm produce from New Jersey. It seized upon "local incidents" to lay a tax. Every sloop which came

down through Hell Gate, every cart of firewood entering the city, and every market boat rowed across the Hudson River had to pay heavy entrance duties. Then came retaliatory measures. See Fiske, *The Critical Period of American History*, Chap. IV. These chronic quarrels were destroying the trade of all the rivals, and it was sought by the Constitution to free trade from local burdens and controls.

This New Jersey tax on transportation of New York's coal supply is more dangerous in the end than the old New York tax on its own firewood. In that case the consumers who ultimately would pay the tax also controlled the government which shortsightedly laid the tax. It was a tariff, and the tariff-ridden people could remove it.

But here the ultimate burden of the tax falls on consumers of New York and elsewhere who have no representation in the government which lays the tax and fixes its amount. The authorities who fix the tax will never have to answer to those who pay it. That is the evil of "taxation without representation." Here is a tax that falls immediately upon a single taxpayer, for it does not appear that any other is similarly affected. It is a tax that falls ultimately on non-residents of the taxing authority. If it is valid, I know of no reason why the community should bear any of its own tax burdens. This is the great vice of these local burdens on interstate movement of goods. If this is not the sort of burden and barrier to a nation's free trade that our commerce clause was designed to end, I should think one would be hard put to find an example. This decision represents a trend that seems to me quite out of the spirit of our history and quite as detrimental to our commercial welfare and unity. See my concurring opinion, *Duckworth* v. *Arkansas*, 314 U. S. 390, 397. I am not unaware of the needs of this locality, as of all others, for revenue. But it seems to me that the activities at Coalberg are as fully in the current of inter-

state commerce as those we held immune from state taxation in *Freeman* v. *Hewit*, decided December 16, 1946, and *Joseph* v. *Carter & Weekes Stevedoring Co.*, decided March 10, 1947. The storage-in-transit service is as essential to maintaining and as much a part of the flow of coal as loading and unloading of goods shipped in interstate commerce is of that commerce. The Constitution laid restraints upon each locality lest their local advantages be pursued at the cost of the commerce on which the prosperity of all depends. I would reverse the judgment.